No. 14-990

Title:	Stephen M. Shapiro, et al., Petitioners v. David J. McManus, Jr., Chairman, Maryland State Board of Elections, et al.
Docketed:	February 18, 2015
Lower Ct:	United States Court of Appeals for the Fourth Circuit
Case Nos.:	(14-1417)
Decision Date:	October 7, 2014
Rehearing Denied:	November 12, 2014

Questions Presented

--Date--	----Proceedings and Orders----------
Feb 10 2015	Petition for a writ of certiorari filed. (Response due March 20, 2015)
Mar 4 2015	Order extending time to file response to petition to and including April 20, 2015.
Mar 20 2015	Brief amicus curiae of Judicial Watch, Inc filed.
Apr 20 2015	Brief of respondents Bobbie S. Mack, et al. in opposition filed.
May 1 2015	Reply of petitioners Stephen M. Shapiro, O. John Beniser, and Maria B. Pycha filed.
May 5 2015	DISTRIBUTED for Conference of May 21, 2015.
May 26 2015	DISTRIBUTED for Conference of May 28, 2015.
Jun 1 2015	DISTRIBUTED for Conference of June 4, 2015.
Jun 8 2015	Petition GRANTED.
Jun 11 2015	Motion to dispense with printing the joint appendix filed by petitioner Stephen M. Shapiro, et al.
Jun 22 2015	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jun 22 2015	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 7, 2015.
Jun 22 2015	The time to file respondents' brief on the merits is extended to and including September 24, 2015.
Jul 6 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Aug 5 2015	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 7 2015	Brief of petitioners Stephen M. Shapiro, et al. filed.
Aug 13 2015	Brief amici curiae of Common Cause and The Campaign Legal Center, Inc. filed.
Aug 14 2015	Brief amicus curiae of Virginia State Conference of the NAACP filed.
Aug 14 2015	Brief amicus curiae of Judicial Watch, Inc filed.
Aug 14 2015	Brief amici curiae of Professors Joshua A. Douglas and Michael E. Solimine, Election Law Scholars filed.
Sep 9 2015	SET FOR ARGUMENT on Wednesday, November 4, 2015
Sep 10 2015	Record requested from the U.S.C.A. 4th Circuit.

Sep 18 2015	The time to file respondents' brief on the merits is further extended to and including September 25, 2015.
Sep 25 2015	Brief of respondents David J. McManus, Jr., Chairman, Maryland State Board of Elections, et al. filed.
Oct 2 2015	CIRCULATED
Oct 26 2015	Reply of petitioners Stephen M. Shapiro, et al. filed. (Distributed)
Nov 4 2015	Argued. For petitioners: Michael B. Kimberly, Washington, D. C. For respondents: Steven M. Sullivan, Assistant Attorney General, Baltimore, Md.
Dec 8 2015	Judgment REVERSED and case REMANDED. Scalia, J., delivered the opinion for a unanimous Court.

Supreme Court U.S.
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14-990
No.

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Three-Judge Court Act requires the convening of three-judge district courts to hear a wide range of particularly important lawsuits, including constitutional challenges to the apportionment of congressional districts and certain actions under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and Communications Act. The Three-Judge Court Act provides that a three-judge court shall be convened to hear such cases unless the single judge to whom the case is initially referred "determines that three judges are not required." 28 U.S.C. § 2284(a), (b)(1).

In *Goosby* v. *Osser*, 409 U.S. 512 (1973), this Court held that the Three-Judge Court Act "does not require the convening of a three-judge court when the [claim] is insubstantial." *Id.* at 518. A claim is insubstantial "for this purpose" if it is "'obviously frivolous,'" "'essentially fictitious,'" or "inescapably * * * foreclose[d]" by this Court's precedents. *Ibid.*

The question presented, which has divided the lower courts, is as follows:

May a single-judge district court determine that a complaint covered by 28 U.S.C. § 2284 is insubstantial, and that three judges therefore are not required, not because it concludes that the complaint is wholly frivolous, but because it concludes that the complaint fails to state a claim under Rule 12(b)(6)?

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PETITION FOR A WRIT OF CERTIORARI

Stephen M. Shapiro, O. John Benisek, and Maria B. Pycha respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 584 F. App'x 140. The single-judge district court's order granting respondents' motion to dismiss (App., *infra*, 3a-21a) is reported at 11 F. Supp. 3d 516.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. A timely petition for rehearing en banc was denied on November 12, 2014. App., *infra*, 22a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 2284, Title 28, of the U.S. Code provides:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented

shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATEMENT

Section 2284 of Title 28 of the U.S. Code provides that "[a] district court of three judges" shall hear any case "challenging the constitutionality of the apportionment of congressional districts" unless the single judge to whom the case is initially referred "determines that three judges are not required." This Court has held that Section 2284 "does not require the convening of a three-judge court when the [claim] is insubstantial." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973). A claim is insubstantial, the Court explained, when it is "obviously frivolous" or "inescapably" meritless. *Ibid.*

This case involves a First Amendment challenge to the 2011 reapportionment of congressional districts in Maryland. Although recognizing that Maryland's convoluted redistricting map may violate the representational rights of a large swath of Maryland voters, a single judge declined to convene a three-judge court to consider the First Amendment claim in this case—not because the judge determined that the claim is wholly frivolous (it is not), but because, in his singular view, the complaint failed to state a First Amendment claim under Federal Rule of Civil Procedure 12(b)(6).

In taking that approach, the district court was following the Fourth Circuit's direction in *Duckworth* v. *State Administration Board of Election Laws*, 332 F.3d 769 (2003). There, the Fourth Circuit held that when a complaint fails to state a claim under Rule 12(b)(6), it is by definition "insubstantial" and properly subject to dismissal without the convening of a three-judge court. The Fourth Circuit summarily affirmed the district court's dismissal of petitioners' complaint in this case on that basis.

That decision warrants this Court's review. The Fourth Circuit's interpretation of Section 2284 conflicts with this Court's precedents and with the holdings of the D.C., Fifth, and Seventh Circuits. Because the claim at issue is non-frivolous (indeed, it should not have been dismissed at all), it should have been heard by a three-judge district court under this Court's teachings, and it would have been heard by a three-judge district court if it had been brought in any of those other jurisdictions.

Proper resolution of the question presented is a matter of great practical importance. The issue is frequently recurring, both in apportionment challenges like this one and in many other cases brought under the Voting Rights Act, Bipartisan Campaign Reform Act, Prison Litigation Reform Act, and other statutes. Congress requires such suits to be heard by three-judge district courts precisely because they implicate important and sensitive matters: The three-judge procedure provides for direct appellate review before this Court, guaranteeing timely resolutions of time-sensitive claims. And it promotes conscientious deliberation and guards against the influence of any one judge's predilections, ensuring greater public confidence and more accurate judicial decisionmaking. Further review is warranted.

A. Statutory background

This case concerns the Three-Judge Court Act of 1910. As since amended, the Act provides that a district court of three judges must be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). When a suit covered by Section

2284(a) is filed, the single-judge court to which the case is initially referred "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge * * * to hear and determine the action or proceeding." 28 U.S.C. § 2284(b)(1).[1]

At issue here is the meaning of the phrase "unless he determines that three judges are not required." The long-settled rule is that a three-judge court is "not required" under Section 2284(a) when "the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emps. Credit Union*, 419 U.S. 90, 100 (1974). Because "general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial" (*McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975)), the Three-Judge Court Act "does not require the convening of a three-judge court" in that circumstance (*Goosby*, 409 U.S. at 518).

Tied as it is to the federal courts' jurisdiction, the word "insubstantial" is a term of art in constitutional litigation—it means "'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Goosby*, 409 U.S. at 518 (citations omitted). In this context, "[t]he limiting words

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[1] This language was initially codified at 28 U.S.C. § 2281 but was, in 1976, recodified at 28 U.S.C. § 2284. See Pub. L. No. 94-381 § 3, 90 Stat. 1119 (1976). The lower courts agree that the 1976 recodification had no impact on the question presented here. See *Kalson* v. *Paterson*, 542 F.3d 281, 288 n.13 (2d Cir. 2008) (citing *LaRouche* v. *Fowler*, 152 F.3d 974, 982 & n.7 (D.C. Cir. 1998), aff'd, 529 U.S. 1035 (2000)).

'wholly' and 'obviously' have cogent legal significance," indicating that "claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous." *Ibid.* In contrast, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Ibid.*

Once a case has been referred to a three-judge district court, "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except" that "[a] single judge shall not * * * enter judgment on the merits." 28 U.S.C. § 2284(b)(3).

Appeals in cases heard by three-judge district courts lie with this Court in the first instance, without intermediate review by the courts of appeals. 28 U.S.C § 1253; 52 U.S.C. § 10304(a). By contrast, "dismissal[s] of a complaint by a single judge [without convening a three-judge court] are * * * reviewable in the court of appeals." *Gonzalez*, 419 U.S. at 100. In an appeal from the refusal to convene a three-judge court, however, the court of appeals is limited to deciding whether the case should have been heard by three judges and is "precluded from reviewing on the merits a case which should have originally been determined by a court of three judges" and appealed directly to this Court. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715-716 (1962) (per curiam) (citing *Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10 (1930)).

B. Factual background

Following the 2010 census, the Maryland General Assembly enacted a congressional redistricting plan. See app., *infra*, 23a. The news media have de-

scribed the plan as the most gerrymandered in the Nation. See Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012), http://perma.cc/82PD-XBRX; Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), http://perma.cc/WWP9-454G.

The news media are not alone in their description of Maryland's congressional districts. In a separate case raising different claims from those presented here, Judge Niemeyer described Maryland's Third Congressional District as "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887, 902 n.5 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012). The perimeter of that contorted district is an astonishing 225 miles (see Erin Cox, *"Gerrymander meander" highlights twisted district*, Baltimore Sun (Sept. 19, 2014), http://perma.cc/3W52-XB4D)—significantly longer than the entire east-west span of the State (see http://perma.cc/F8YA-VYQT).

Several other districts feature narrow, meandering ribbons linking together larger, geographically distant regions. The Sixth District, for example, connects the mountainous, westernmost region of the state with Potomac, a densely populated suburb of Washington, D.C. As District Judge Titus explained in his concurring opinion in *Fletcher*, linking these regions brings together a group of voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears * * * with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." 831 F. Supp. 2d at 906.

C. Procedural background

1. Petitioners—a bipartisan group of concerned Marylanders—filed a complaint in the District Court for the District of Maryland, challenging the constitutionality Maryland's redistricting plan. As relevant here, petitioners alleged that the plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [v. *Jubelirer*, 541 U.S. 267 (2004)]." Am. Compl. ¶ 23. See also *id.* ¶ 2 (map violates "First Amendment rights of political association"); *id.* ¶ 5 ("the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association"). According to Justice Kennedy's concurrence in *Vieth*, political gerrymanders may "impose burdens and restrictions on groups or persons by reason of their views," which "would likely be a First Amendment violation, unless the State shows some compelling interest." 541 U.S. at 315.

Petitioners also expressly requested the convening of a three-judge court. Am. Compl. ¶ 6.

2. A single-judge district court dismissed the case without referring the matter to a three-judge court. App., *infra*, 3a-21a. The court "recognize[d] that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a 'substantial question.'" App., *infra*, 7a. But, the court explained, "in the present context, the 'substantial question' standard and the legal sufficiency standard are one and the same" because, "where a plaintiff's 'pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.'" App., *infra*, 7a-8a (quoting *Duck-*

worth, 332 F.3d at 772-773). The single-judge court therefore "appl[ied] the usual Rule 12(b)(6) standard in deciding th[e] motion." App., *infra*, 8a.

Applying that standard, the single-judge court dismissed petitioners' First Amendment claim on the merits. The court was "not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness" and recognized that "[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case, fail to provide 'fair and effective representation for all citizens.'" App., *infra*, 19a-20a (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 565-566 (1964)).

The court nevertheless rejected petitioners' First Amendment claim because, in its unilateral view, the claim "is not one for which relief can be granted." App., *infra*, 21a. That is so, the court concluded, because "nothing about the congressional districts at issue in this case affects in any proscribed way Plaintiffs' ability to participate in the political debate." App., *infra*, 20a (internal quotation marks and alteration marks omitted). Petitioners "are free," the court continued, "to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." App., *infra*, 21a (internal quotation marks omitted). On that basis, the single-judge court dismissed the claim on the merits, refusing to convene a three-judge court. *Ibid.*[2]

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[2] The court also dismissed as nonjusticiable certain other claims brought under various sections of Article I and the Fourteenth Amendment. App., *infra*, 13a-20a. The merits of the court's jusiticiability holding are not subject to challenge here. Cf. *infra*, 29 n.12.

3. The court of appeals summarily affirmed (App., *infra*, 1a-2a) and denied petitioners' request for rehearing en banc (App., *infra*, 22a).

REASONS FOR GRANTING THE PETITION

This case presents the question whether a single-judge district court may refuse to refer a non-frivolous suit governed by 28 U.S.C. § 2284(a) to a three-judge court because, in the single judge's singular view, the complaint fails to state a claim under Civil Rule 12(b)(6). In conflict with the holdings of the D.C., Fifth, and Seventh Circuits, the Fourth Circuit has held that it may.

That decision should not stand. Aside from ignoring this Court's precedents, it creates a conflict of authority among the lower courts. As a result, the Three-Judge Court Act is being applied differently in jurisdictions throughout the Nation. What is more, proper resolution of the question presented is a matter of great practical importance. Section 2284 governs not only redistricting challenges like this one, but also suits brought under the Voting Rights Act, the Prison Litigation Reform Act, Communications Act, and nearly a dozen other statutes. And this case presents a suitable vehicle with which to resolve the conflict: Petitioners' claims are not obviously frivolous and should have been decided by a three-judge panel, followed by a right of appeal directly to this Court. Further review is warranted.

A. *Duckworth* conflicts with this Court's precedents

According to the Fourth Circuit's decision in *Duckworth*, when a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district

court without convening a three-judge court." 332 F.3d at 772-773. Thus, within the Fourth Circuit, there is "no material distinction" "between a complaint that 'does not state a substantial claim for relief' and the Rule 12(b)(6) standard." *Fletcher*, 831 F. Supp. 2d at 892 (Niemeyer, J.).

The *Duckworth* rule is flatly inconsistent with this Court's precedents in two separate respects.

First, whereas *Goosby* forbids the dismissal of a case by a single-judge court when the case involves an arguable legal theory, *Duckworth* permits it. According to *Goosby*, Section 2284 "does not require the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial." 409 U.S. at 518. But,

> '[c]onstitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.' The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. A claim is insubstantial only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'

Ibid. (internal citations omitted). The insubstantiality standard sets so high a bar because the consequences of its application are severe: "general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial." *McLucas*, 421 U.S. at 28.

But it hardly requires stating that, under the 12(b)(6) framework, "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Hagans*, 415 U.S. at 542 (quoting *Bell* v. *Hood*, 327 U.S. 678, 682 (1946)). Thus, the sufficiency of a complaint under Rule 12(b)(6) is "a question of law * * * [that] must be decided after and not before the court has assumed jurisdiction over the controversy." *Bell*, 327 U.S. at 682. The basis for that conclusion is evident: "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable," "indisputably meritless," or "fantastic or delusional." *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989). On the contrary, "Rule 12(b)(6) authorizes a court to dismiss a claim on the basis of [any] dispositive issue of law, * * * without regard to whether [the claim] is based on an outlandish legal theory or on a close but ultimately unavailing one." *Id.* at 326-327.

There is no way to reconcile this Court's holding in *Goosby* with the Fourth Circuit's decision in *Duckworth*. Indeed, *Duckworth* equates two concepts that this Court repeatedly has said are distinct. By doing so, it permits precisely what *Goosby* forbids: It allows a single-judge court to refuse to refer a non-frivolous complaint to a three-judge court based upon "previous decisions that merely render claims of doubtful or questionable merit." 409 U.S. at 518.

Second, whereas *Idlewild* forbids the courts of appeals from ruling on the merits of a case that should have been decided by a three-judge district court, *Duckworth* frequently requires it. This conflict is fundamental: "When an application for a statutory three-judge court is addressed to a [single-judge] district court, the [single-judge] court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, * * * and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idlewild*, 370 U.S. at 715. If the requirements are met, the case must be referred to a three-judge court, appeals from which are reserved exclusively for this Court's mandatory docket. *Gonzalez*, 419 U.S. at 97.

Thus, when a plaintiff appeals from a single-judge court's refusal to refer a matter to a three-judge court, the court of appeals must determine whether the refusal was proper, *and no more*; it is "precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716 (citing *Stratton*, 282 U.S. at 10). That conclusion follows not only from this Court's exclusive mandatory jurisdiction over such cases on appeal, but also from the settled rule that a court of appeals' "jurisdiction over the merits of [a] claim[] is a function of the district court's jurisdiction" over the claim. *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001).

Duckworth turns that settled jurisdictional framework on its head. Under *Duckworth*, the Fourth Circuit must review the merits of any case dismissed under Rule 12(b)(6), even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been con-

vened. As a result, the Fourth Circuit will inevitably find itself issuing merits holdings that paradoxically deprive it of jurisdiction to issue merits holdings, in manifest conflict with *Idlewild*. There is no way around that conflict or the conflict with *Goosby*.[3]

B. *Duckworth* conflicts with the holdings of other courts of appeals

Unsurprisingly, *Duckworth* also conflicts with the holdings of other courts of appeals. Two other courts of appeals—the D.C. Circuit and Fifth Circuit—have confronted the question whether single-judge courts are permitted to rule on motions to dismiss and have held that they cannot. Both courts thus require single-judge district courts to refer Section 2284 cases to three-judge district courts unless the complaint is obviously frivolous. And in a different legal context, the Seventh Circuit expressly rejected the reasoning that underlies *Duckworth*. The outcome of this case would have been different in any one of those other jurisdictions.

District of Columbia Circuit. The District of Columbia Circuit's holding in *LaRouche* v. *Fowler*, 152 F.3d 974 (D.C. Cir. 1998), aff'd, 529 U.S. 1035 (2000), expressly rejected the rule later adopted by the Fourth Circuit in *Duckworth*.

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[3] *Duckworth* also short-circuits Section 2284(b)(3)'s prohibition on merits rulings by single-judge courts. To be sure, "[t]he constraints imposed by § 2284(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is required, under the terms of § 2284(a), to be heard by a district court of three judges," which is the question at issue. *Page*, 248 F.3d at 184. But according to *Duckworth*, before Section 2284(b)(3)'s prohibition on merits rulings by single-judge courts can be "triggered," the single-judge court *must issue a ruling on the merits*. That makes nonsense of the statutory scheme.

The plaintiff in *LaRouche* "sought the appointment of a three-judge district court to hear the case, pursuant to section 5 of the Voting Rights Act and 28 U.S.C. § 2284." 152 F.3d at 977. But "the district court denied the application for a three-judge court and dismissed the entire complaint, with prejudice as to all defendants, pursuant to Fed. R. Civ. P. 12(b)(6)." *Ibid.*

On appeal, the D.C. Circuit held that it "lack[ed] jurisdiction to decide the merits of [the case] because the [merits] question properly belong[ed] before a three-judge district court." *LaRouche*, 152 F.3d at 981. In reaching that conclusion, Judge Garland, writing for the court, explained that Section 2284 permits "a single judge [to] determine that three judges are not required * * * only if a plaintiff's challenge is wholly insubstantial." *Id.* at 982 (internal quotation marks and alteration marks omitted). A single-judge court may not, however, "determine the merits of [the] claims." *Id.* at 981.

Thus, the D.C. Circuit rejected the Democratic National Committee's argument that Section 2284 "permit[s] a single judge to grant a motion to dismiss" under the Rule 12(b)(6) standard. *LaRouche*, 152 F.3d at 982. According to that court, a single-judge court has no authority to "enter judgment on the merits of a claim * * * that is not 'wholly insubstantial' or 'obviously frivolous.'" *Id.* at 983. And the "substantiality" necessary to get to a three-judge court requires only a "minimal" showing: "'A claim is insubstantial only if its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject and leave no room for the inference that the questions sought to be

raised can be the subject of controversy.'" *Id.* at 982 (quoting *Goosby*, 409 U.S. at 518).

Finding that the claims in that case were not obviously frivolous, the D.C. Circuit held that the single-judge court erred by dismissing the plaintiff's claims under Rule 12(b)(6) and "remand[ed] them for consideration by a three-judge court." *LaRouche*, 152 F.3d at 986. Recognizing the difference between frivolousness and failure to state a claim, moreover, the court was careful to "say only enough to determine whether LaRouche's claims [were] 'obviously frivolous' or 'wholly insubstantial,' and not to intimate a final view as to their merits." *Id.* at 983.

Fifth Circuit. The Fifth Circuit took a similar approach in *LULAC of Texas* v. *Texas*, 113 F.3d 53 (5th Cir. 1997) (per curiam), a Voting Rights Act case. There, "[t]he district court, without convening a three-judge court, * * * concluded that no election change had occurred" during the relevant time "and dismissed appellants' claims pursuant to Fed. R. Civ. P. 12(b)(6)." *Id.* at 55.

On appeal, the Fifth Circuit explained that Section 5 cases generally "must be referred to a three-judge court for the determination of whether the political subdivision has adopted a change covered by § 5 without first obtaining preclearance." *LULAC*, 113 F.3d at 55. "However, where § 5 claims are 'wholly insubstantial' and completely without merit, such as where the claims are frivolous, essentially fictitious, or determined by prior case law, a single judge may dismiss the claims without convening a three-judge court." *Ibid.*

Recognizing that the plaintiff's claims were arguable, the Fifth Circuit could not "conclude that

from a legal standpoint LULAC's claim is 'wholly insubstantial.'" *LULAC*, 113 F.3d at 55. On that basis, the Fifth Circuit held that the single-judge court had erred by not referring the matter to a three-judge court: "Because we conclude that neither the legal nor the factual basis for LULAC's § 5 claim is 'wholly insubstantial,' we reverse the district court's order dismissing LULAC's claim and remand for the convening of a three-judge court." *Id.* at 56.

Seventh Circuit. The decision below is also irreconcilable with the Seventh Circuit's decision in *Bovee* v. *Broom*, 732 F.3d 743 (7th Cir. 2013). As that court explained in a different legal context, "a constitutional theory can be so feeble that it falls outside federal jurisdiction." *Id.* at 744 (citing *Goosby* and *Hagans* v. *Lavine*, 415 U.S. 528 (1974)). But, according to the Seventh Circuit, a dismissal under the *Goosby* standard (which calls for a decision on jurisdiction) is distinct from a dismissal under the Rule 12(b)(6) standard (which calls for a decision "on the merits"). *Ibid.* The court thus rejected the "assum[ption] that any complaint that fails to state a claim on which relief may be granted also falls outside federal subject-matter jurisdiction." *Ibid.* Unless a claim is "obviously frivolous" (and assuming that "all [other] formal aspects of a federal claim [are] satisfied"), the claim must be "resolved on the merits rather than tossed for lack of jurisdiction." *Ibid.*

Duckworth cannot be sqaured with *LaRouche*, *LULAC*, or *Bovee*. There is no doubt that this case would have been heard by a three-judge district court in the D.C., Fifth, and Seventh Circuits. Further review is therefore warranted to ensure that

Section 2284 is applied uniformly throughout the Nation.[4]

C. The question presented is important

Whether a case like this one should be dismissed by a single-judge court or instead referred to a three-judge court is a recurring matter of substantial practical importance, and this case affords an ideal opportunity to address the issue.

1. The question presented arises in a great many cases. Three-judge district courts are most commonly convened to consider matters relating to redistricting following a decennial census. Following the 2010 census—the first census conducted after *Duckworth* was decided in 2003—three-judge courts were convened in two dozen voter-right-related cases outside the Fourth Circuit.[5] Doubtless, many of those cases

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[4] The case would likely have been referred to a three-judge court in the Second and Third Circuits, as well. The Second Circuit applied the obviously-frivolous standard in *Kalson* v. *Paterson*, 542 F.3d 281 (2008). The Third Circuit did the same in *Page*. And the substantiality doctrine, according to the Third Circuit, "set[s] an extremely high bar": "To be deemed frivolous, a constitutional claim must be 'essentially fictitious,' 'wholly insubstantial,' and 'legally speaking non-existent.'" 248 F.3d at 192 (quoting *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962)).

[5] See *Arizona State Leg.* v. *Arizona Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Evenwel* v. *Perry*, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014); *Harris* v. *Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014) (per curiam), statement of jurisdiction filed, 83 U.S.L.W. 3118 (U.S. Aug. 25, 2014) (No. 14-232); *Kostick* v. *Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013) (per curiam), aff'd, 134 S. Ct. 1001 (2014); *Brown* v. *Kentucky Leg. Research Comm'n*, 966 F. Supp. 2d 709 (E.D. Ky. 2013) (per curiam); *Perez* v. *Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013); *Alabama Leg. Black Caucus* v. *Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala.

would have been dismissed (improperly, we submit) by single-judge courts if they had been filed in the Fourth Circuit.

Within the Fourth Circuit, the convening of a three-judge district court was requested in ten cases after the 2010 census, including in this one; those requests were granted in six cases[6] and denied in

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2013); *New Hampshire* v. *Holder*, 293 F.R.D. 1 (D.D.C. 2013); *Baldus* v. *Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam); *Essex* v. *Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012) (per curiam); *Favors* v. *Cuomo*, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *James* v. *FEC*, 914 F. Supp. 2d 1 (D.D.C. 2012), vacated, 134 S. Ct. 1806 (2014); *McCutcheon* v. *FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012), rev'd, 134 S. Ct. 1434 (2014); *Mi Familia Vota Educ. Fund* v. *Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012); *NAACP* v. *Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012) (per curiam); *Texas* v. *United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), vacated and remanded, 133 S. Ct. 2885 (2013); *Desena* v. *Maine*, 793 F. Supp. 2d 456 (D. Me. 2011); *Little* v. *Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011) (per curiam); *Petteway* v. *Henry*, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); *Schonberg* v. *FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011) (per curiam); *Smith* v. *Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *United States* v. *Sandoval Cnty.*, 797 F. Supp. 2d 1249 (D.N.M. 2011) (per curiam); *Clemons* v. *U.S. Dep't of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss.), vacated, 131 S. Ct. 821 (2010); *City of Kings Mountain* v. *Holder*, 746 F. Supp. 2d 46 (D.D.C. 2010) (per curiam).

[6] *Page* v. *Virginia State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014); *Somers* v. *South Carolina State Election Comm'n*, 871 F. Supp. 2d 490 (D.S.C. 2012); *Backus* v. *South Carolina*, 857 F. Supp. 2d 553 (D.S.C.), aff'd, 133 S. Ct. 156 (2012); *Jefferson Cnty. Comm'n* v. *Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va.), rev'd and remanded, 133 S. Ct. 3 (2012) (per curiam); *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), aff'd, 133 S. Ct. 29 (2012); *Butler* v. *City of Columbia*, 2010 WL 1372299 (D.S.C. Apr. 5, 2010).

four.[7] In three of the four denials, a single judge, sitting alone, invoked *Duckworth* to dismiss the case on the merits under Rule 12(b)(6).[8] The question presented is therefore affecting the treatment of many challenges to the reapportionment of congressional districts.

The question presented is also relevant to many more cases outside the redistricting context. Section 2284 provides for the convocation of three-judge courts to hear any case when "otherwise required by Act of Congress." 28 U.S.C. § 2284(a). There are over one dozen other statutory provisions that require the convening of three-judge courts under Section 2284, including several relevant to campaigning and elections, like the Voting Rights Act (52 U.S.C. §§ 10101(g), 10303(a)(5), 10304(a), 10306(c), 10504, 10701(a)(2)), the Bipartisan Campaign Reform Act (52 U.S.C. § 30110 note), and the Presidential Election Campaign Fund Act (26 U.S.C. § 9010(c)).[9]

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[7] In addition to this case, see *Gorrell* v. *O'Malley*, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson* v. O'Malley, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Carter* v. *Virginia State Bd. of Elections*, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011).

[8] Those cases included *Gorrell*, *Olson*, and this case. In addition, and notwithstanding the Third Circuit's decision in *Page*, the Eastern District of Pennsylvania recently declined to convene a three-judge court under the *Duckworth* standard. See *Garcia* v. *2011 Legislative Reapportionment Com'n*, 938 F. Supp. 2d 542, 554 (E.D. Pa. 2013) (citing *Duckworth*, 332 F.3d at 772-773). The Third Circuit affirmed on unrelated standing grounds. *Garcia* v. *2011 Legislative Reapportionment Com'n*, 559 F. App'x 128 (3d Cir. 2014).

[9] Among the notable cases heard by three-judge district courts under those statutes are *McCutcheon* v. *FEC*, 134 S. Ct. 1434 (2014) (BCRA), *Perry* v. *Perez*, 132 S. Ct. 934 (2012) (VRA), *Citizens United* v. *FEC*, 558 U.S. 310 (2010) (BCRA), *League of*

Other statutes requiring three-judge review include the Prison Litigation Reform Act (18 U.S.C. § 3626-(a)(3)(B)), and the Communications Act (47 U.S.C. § 555(c)(1)),[10] among others. See 2 U.S.C. §§ 8(b)(4), 922(a)(5); 42 U.S.C. § 2000a-5(b); 45 U.S.C. § 719.

The question presented is likely to affect many suits brought under these other important statues. A question that recurs so frequently under so many different statutes deserves nationwide resolution.

2. The question presented is also inherently important, wholly apart from its perpetual recurrence. "Allegations of unconstitutional bias in apportionment are most serious claims." *Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring). Congress requires the convening of three-judge courts in congressional redistricting cases because "[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters." *Page*, 248 F.3d at 190. "[I]n such redistricting challenges, the potential for

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United Latin American Citizens v. *Perry*, 548 U.S. 399 (2006) (VRA), *McConnell* v. *FEC*, 540 U.S. 93 (2003) (BCRA), and *FEC* v. *National Conservative Political Action Committee*, 470 U.S. 480 (1985) (Presidential Election Campaign Fund Act). These cases remain frequently recurring. *E.g.*, *Rufer* v. *FEC*, 2014 WL 4076053, at *4-5 (D.D.C. Aug. 19, 2014) (in a BCRA case, declining to reach the merits and applying the substantiality standard instead).

[10] Among the notable cases heard by three-judge district courts under the PLRA and Communications Act are *Brown* v. *Plata*, 131 S. Ct. 1910 (2011) (PLRA), *Coleman* v. *Brown*, 952 F. Supp. 2d 901 (E.D. Cal. 2013) (PLRA), *Coleman* v. *Schwarzenegger*, 922 F. Supp. 2d 882 (E.D. Cal. 2009) (PLRA), *Turner Broad. Sys., Inc.* v. *FCC*, 520 U.S. 180 (1997) (Communications Act), and *National Interfaith Cable Coal., Inc.* v. *FCC*, 512 U.S. 1230 (1994) (Mem.) (Communications Act).

federal disruption of a state's internal political structure is great." *Ibid.* As this Court has noted, such cases typically involve "confrontations between state and federal power * * * [and the] potential for substantial interference with government administration." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 562 (1969).

The importance and sensitivity of redistricting challenges "counsel[] in favor of the establishment of a specialized adjudicatory machinery" (*Page*, 248 F.3d at 190) for two reasons.

First, the three-judge procedure, which bypasses review by the circuit courts and permits direct appeals to this Court, "accelerat[es] a final determination on the merits." Leland C. Nielsen, *Three-Judge Courts: A Comprehensive Study*, 66 F.R.D. 495, 499 (1975). See also 148 Cong. Rec. S2142 (2002) (three-judge courts ensure "prompt and efficient resolution of the litigation") (statement of Sen. Feingold). Speedy resolution of cases subject to Section 2284 is essential because "the length of time required to appeal through the circuit courts to the Supreme Court" may be "disrupt[ive]" to the state laws being challenged. Nielsen, 66 F.R.D. at 499-500. In voting rights cases—the merits of which are implicated in each election annually—delay may also undermine the underlying purpose of the suit: "a court order permitting a man to vote is a hollow victory, when the order is handed down after the election has been held and the votes counted." 110 Cong. Rec. 1536 (1964) (statement of Congressman McCulloch).

The difference between appeals from single-judge courts and three-judge courts thus has very real consequences. Take, for example, this Court's consideration this Term of *Arizona State Legislature* v. *Ari-*

zona Independent Redistricting Commission, No. 13-1314. In that case, the initial single-judge court recognized that the plaintiffs' claims were unlikely to succeed on the merits but properly referred the matter to a three-judge court because the judge could not say that "the plaintiff's constitutional claim is so obviously foreclosed * * * that there can be no controversy on the issue as a matter of law." *Ariz. State Leg.* v. *Ariz. Indep. Redistricting Comm'n*, 2013 WL 4177067, at *3 (D. Ariz. Aug. 14, 2013). A three-judge court later granted the defendants' motion to dismiss (997 F. Supp. 2d 1047, 1056 (D. Ariz. 2014)), and an appeal was taken directly to this Court.

The course of that case would have been very different if it had arisen in the Fourth Circuit. Under *Duckworth*, the initial single-judge court would have had authority to grant the defendant's motion to dismiss without referring the matter to a three-judge court. Thus, rather than appealing immediately to this Court from a decision of a three-judge court pursuant to Section 1253, the Arizona legislature would have had to notice an appeal to the circuit court—a process that, by itself, may have dragged on for longer than two years. If the appellate court had affirmed, there would have been no review as of right before this Court. And if it had reversed, the case would have gone back down to a three-judge court, and only once that court had issued a decision on the merits would a direct appeal to this Court have been available.

Congress never intended for time-sensitive redistricting cases to be decided according to such a convoluted process; it "preserve[d] three-judge courts for cases" like this one precisely because "these issues are of such importance that they ought to be heard

by a three-judge court," with the benefit of streamlined appellate review. *Page*, 248 F.3d at 190 (quoting S. Rep. No. 94-204 (1976), reprinted in 1976 U.S.C.C.A.N. 1988, 1996).

Second, convening three-judge courts "assure[s] more weight and greater deliberation by not leaving the fate of such litigation to a single judge." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). In other words, the procedure "affords a greater likelihood of freedom from personal bias, of careful deliberation, and of recognition of the seriousness of the issue involved." Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 Harv. L. Rev. 299, 302 (1963). This not only "reduce[s] the chance that * * * state [action will] be invalidated by the caprice or bias of a single judge" but also "quiet[s] public discontent with unpopular decisions" because "people [can] rest [more] eas[ily] under" a decision by three judges. Note, *Judicial Limitation of Three-Judge Court Jurisdiction*, 85 Yale L.J. 564, 565 & n.7 (1976) (internal quotation marks omitted).

These observations are not merely academic. It is not uncommon for a three-judge district court to decide a case by divided vote.[11] Such disagreement among judges in cases like this one opens the very real possibility that some cases dismissed by single-

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[11] See *Harris*, 993 F. Supp. 2d at 1080-1090 (Silver, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 1090-1109 (Wake, J., concurring in part, dissenting in part, and dissenting from the judgment); *Alabama Leg. Black Caucus*, 988 F. Supp. 2d at 1315-1343 (Thompson, J., concurring in part and dissenting in part); *Texas*, 887 F. Supp. 2d at 190-196 (Griffith, J., dissenting in part); *Petteway*, 2011 WL 6148674, at *3-*9 (Hoyt, J., dissenting).

judge district courts under *Duckworth* would have been decided differently by courts of three judges.

Indeed, that is just what happened in a recent Voting Rights Act case in the Fifth Circuit: A single judge refused to refer the matter to a three-judge court and dismissed the case under the traditional 12(b)(6) framework. Order at 11-13, *LULAC* v. *Texas*, No. 5:08-cv-389 (W.D. Tex.) (Dkt. 15). The Fifth Circuit reversed and remanded with instructions to convene a three-judge court. 318 F. App'x 261 (5th Cir. 2009) (per curiam). On remand, the three-judge court denied summary judgment to the defendants (651 F. Supp. 2d 700 (W.D. Tex. 2009)), who subsequently obtained the Section 5 preclearance that the plaintiffs had argued all along was required (428 F. App'x 460, 462 (5th Cir. 2011) (per curiam)).

Page is also an instructive example. In the words of the Third Circuit, the district court's opinion denying relief in that case was "less than pellucid." 248 F.3d at 186. Cognizant of "the potentially disruptive effects that [its] actions could have on New Jersey's electoral process," the Third Circuit—sitting, of course, as a panel of three judges—issued a lengthy and fastidious opinion disagreeing with the single-judge court and "articulat[ing] [its] disposition * * * with surgical accuracy." 248 F.3d at 179, 198. Against this backdrop, there is no serious question that review by a three-judge court affects the quality of judicial decisionmaking and has the potential to change outcomes on the merits.

This Court's immediate intervention is therefore imperative. Given the cyclical nature of most election-related litigation under Section 2284, there may not be another opportunity to resolve the question presented until after the next census in 2020. And by

the time such a case finally wends its way to this Court's doors, several more cases are likely to have been improperly dismissed under *Duckworth*. Conversely, if *Duckworth* was rightly decided, many more cases outside the Fourth Circuit will have been erroneously referred to three-judge courts.

This case presents a clean, uncomplicated vehicle for resolving the question presented. The Court accordingly should take this opportunity to restore uniformity to the application of Section 2284 throughout the Nation.

D. Petitioners' First Amendment claim is not obviously frivolous

Because petitioners' First Amendment claim is not frivolous—indeed, it should not have been dismissed even under Rule 12(b)(6)—the single-judge district court's application of *Duckworth* improperly deprived them of consideration of their claim by a three-judge court and an immediate appeal to this Court.

Petitioners allege that Maryland's redistricting map violates their First Amendment rights. Giving the claim little more than the back of its hand, the single-judge court stated conclusorily that the redistricting map does not limit petitioners' "ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves" or "to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." App., *infra*, 20a-21a (internal quotation marks omitted). And it asserted that First Amendment protections do not, in any event, "extend beyond those more directly, and per-

haps only, provided by the fourteenth and fifteenth amendments." App., *infra*, 21a (internal quotation marks omitted).

None of this Court's precedents compels those conclusions. On the contrary, Justice Kennedy's concurrence in *Vieth*—which may be understood as the controlling opinion in that case (see *Marks* v. *United States*, 430 U.S. 188, 193 (1977))—confirms that citizens enjoy an essential First Amendment interest in not being "burden[ed] or penaliz[ed]" for "participation in the electoral process," for their "voting history," for "association with a political party," or for "expression of political views." 541 U.S. at 314 (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality) and *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)).

Thus, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Ibid.* And "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315.

That is just what petitioners have alleged here. Maryland's congressional redistricting map subjects Republicans to disfavored treatment by sorting them into distant Democratic-dominated districts based on their past voting behavior and political-party affilia-

tion. In combination with Maryland's closed primary system, the redistricting map thus "burden[s]" Republican voters on the basis of their "voting history" and "association with a political party." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring).

That is not all. The end result of the Maryland gerrymander is not only to penalize Republican Marylanders for exercising core First Amendment rights, but also to discourage them from further engaging in the political process *at all*, whether by association with their political party, expression of their political views, or any other form of political participation. By condemning Republicans to a Sisyphean fate, in other words, Maryland's redistricting map (together with a closed primary system) chills those First Amendment activities that are most essential to the proper functioning of representative government.

This Court's ballot-access cases thus offer an additional basis for measuring the burdens at issue here: "A burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983). On this score, "[t]he inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974)). Thus, for example, "classification schemes that impose burdens on new or small political parties or independent candidates" may violate "First Amendment interests in ensuring freedom of association" by effectively penalizing individuals' "association with particular political parties." *Id.* at 964-965. "Consequently, the

State may not act to maintain the 'status quo' by making it virtually impossible for" candidates from other parties to achieve certain measures of electoral success. *Id.* at 965. (citing *Williams* v. *Rhodes*, 393 U.S. 23, 25 (1968)). That is what is alleged here.

In dismissing petitioners' First Amendment claim all the same, the lower court relied exclusively on prior opinions of the District of Maryland and the Fourth Circuit. See App., *infra*, 20a-21a (citing *Duckworth* v. *State Bd. of Elections*, 213 F. Supp. 2d 543, 557-558 (D. Md. 2002); *Anne Arundel Cty. Republican Cent. Comm.* v. *State Admin. Bd. of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991); and *Washington* v. *Finlay*, 664 F.2d 913, 927 (4th Cir. 1981)). But none of those cases deals with the arguments laid out above. And in any event, a claim can be substantial despite the existence of adverse circuit precedent, as, for example, when it is inconsistent with intervening Supreme Court precedent.

Against this legal backdrop, petitioners' First Amendment claim is non-frivolous and, indeed, should not have been dismissed under the more demanding Rule 12(b)(6) standard. Petitioners accordingly were entitled to present their case to a three-judge district court.[12]

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[12] If the Court grants the petition and ultimately remands the First Amendment claim for consideration by a three-judge court, it should do so with instructions to refer the entire complaint. See *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 504 n.5 (1972) (if a single claim in a complaint is properly referred to a three-judge court, "three-judge court jurisdiction exists over all of [the] claims [in the complaint]," including ones that might not independently qualify); *Page*, 248 F.3d at 187-188 ("the entire case, and not just [certain] claims, must be heard by a three-judge court").

CONCLUSION

The petition should be granted.

Respectfully submitted.

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FEBRUARY 2015

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14-1417

O. John Benisek; Stephen M. Shapiro; Maria B. Pycha,

Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore

James K. Bredar, District Judge

(1:13-cv-03233-JKB)

Submitted: Sept. 30, 2014

Decided: Oct. 7, 2014

Before NIEMEYER and KING, Circuit Judges, and DAVIS, Senior Circuit Judge.

PER CURIAM:

O. John Benisek, Stephen Shapiro, and Maria Pycha appeal the district court's order dismissing a civil complaint challenging, on several grounds, Maryland's congressional districting plan enacted by the state legislature in 2011. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. Benisek v. Mack, No. 1:13-cv-03233-JKB (D. Md. Apr. 8, 2014). We deny Shapiro's motion for oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

O. JOHN BENISEK, *et al.*,

Plaintiffs,

v.

BOBBIE S. MACK, Chair, Maryland State Board of Elections, *et al.*, in their official capacities,

Defendants.

Civil No. JKB-13-3233

MEMORANDUM

O. John Benisek, Stephen M. Shapiro, and Maria B. Pycha (collectively "Plaintiffs") brought this suit against Bobbie S. Mack, Chair of the Maryland State Board of Elections, and Linda H. Lamone, State Administrator of the Maryland State Board of Elections, (collectively "Defendants"), in their official capacities, alleging that the 2011 congressional districts established by the Maryland General Assembly violate Plaintiffs' rights under Article I, Section 2 of the United States Constitution, as well as under the First and Fourteenth Amendments to the United States Constitution. Now pending before the Court is Defendants' motion to dismiss for failure to state a claim (ECF No. 13). The issues have been briefed and no hearing is required. Local Rule 105.6. For the reasons set forth below, the motion will be granted.

I. BACKGROUND[1]

In 2011, following the 2010 decennial census, the Maryland General Assembly enacted a congressional redistricting plan. Md. Code Ann., Elec. Law § 8-701 *et seq.*; (Am. Compl., ECF No. 11, at ¶¶ 7-8.) This plan closely followed the recommendations of the Governor's Redistricting Advisory Committee ("GRAC"), which included the President of the Maryland Senate and the Speaker of the Maryland House of Delegates. (Am. Compl. at ¶ 8.) Several of the districts created under this plan—in particular the 4th, 6th, 7th, and 8th congressional districts—are composed of two "de-facto non-contiguous segments—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments." (*Id.* at ¶ 10.) Further, in each of these districts, one of the two "de-facto non-continuous segments" is "far more populous than the other as well as being socioeconomically, demographically, and politically inconsistent with the other segment" (*Id.* at ¶ 11.)

For example, Plaintiffs describe the 4th congressional district as follows[2]:

> This district is a majority African-American district that was first developed in 1990 to account for the increasing population of African-American residents within Prince

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[1] The facts are recited here as alleged by the Plaintiff, this being a motion to dismiss. See Ibarra v. United States, 120 F.3d 472, 474 (4th Cir. 1997).

[2] Plaintiffs make similar claims as to the 6th, 7th, and 8th congressional districts. (*Id.* at ¶ 12(b)-(d).).

> George's County. The dominant portion of the 4th district is centered in the portion of Prince George's County within the Capital Beltway and bordering the District of Columbia. This portion of the [congressional] district contains 450,000 residents who are predominantly (74%) African-American (and 16% Hispanic and 6% white), urban, lower-middle income, and overwhelmingly Democratic voters. President Obama received 96% of the vote within this portion in 2008. This segment is attached through a narrow ribbon to the smaller segment of 185,000 residents in northeastern Anne Arundel County who are predominantly Republican voters. President Obama received 42% of the vote within this portion in 2008. These Anne Arundel residents share little in common with their Prince George's counterparts that is relevant to effective or meaningful representation.... Given the composition of this district, its Representative will be elected by the voters of the Prince George's segment, and will almost certainly be a Democrat.... As [a] practical matter, the election of the district's Representative will be determined by the Democratic primary election.

(*Id.* at ¶¶ 12(a)(1)-(2).)

On November 11, 2013, Plaintiffs filed this suit challenging "the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts." (*Id.* at ¶ 2.) Specifically, Plaintiffs allege that the "non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th,

7th, and 8th [c]ongressional districts" violates their rights "of representation as protected by Article I Section 2 of the U.S Constitution," their "right to vote for Representatives to Congress, as protected by both the first and second clauses to the 14th Amendment of the U.S. Constitution," and their "First Amendment rights of political association." (*Id.*)

On December 2, 2013, Plaintiffs filed an amended complaint. (Am. Compl.) Defendants now move to dismiss this amended complaint for failure to state a claim for which relief can be granted. (ECF No. 13.)

II. LEGAL STANDARD

The present action challenges the "constitutionality of the apportionment of congressional districts" and is therefore required to be heard and determined by a "district court of three judges." 28 U.S.C. § 2284(a). However, the single judge to whom the request for a three-judge panel is presented may "determine[] that three judges are not required" and "may conduct all proceedings except the trial and enter all orders permitted by the rules of civil procedure except as provided in this subsection."[3] § 2284(b)(1), (3). In particular, the single judge may grant a defendant's motion to dismiss under Rule 12(b)(6) where a plaintiff's pleadings fail to state a claim for which relief can be granted. *Duckworth v. State Admin. Bd. Of Election Laws*, 332 F.3d 769 (4th Cir. 2003).

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[3] The statute further provides that "[a] single judge shall not appoint a master, or order a reference or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." § 2284(b)(3).

This motion to dismiss, like all others under Rule 12(b)(6) of the Federal Rules of Civil Procedure, is a test of the legal sufficiency of a complaint. *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). *See also Ashcroft v. Iqbal*, 556 U.S. 66Z 678 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). The Court will therefore evaluate it under the usual Rule 12(b)(6) standard.

The Court recognizes that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a "substantial question." *Faustino v. Immigration and Naturalization Services*, 302 F. Supp. 212, 213 (S.D.N.Y. 1969), aff'd 386 F.2d 449, cert. denied 391 U.S. 915; *Lamont v. Commissioner of Motor Vehicles*, 269 F. Supp. 880, 884 (S.D.N.Y. 1967), *aff'd* 386 F.2d 449, *cert. denied* 391 U.S. 915. In *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 D.2d 606 (4th Cir. 1970), for example, the Fourth Circuit held that "[w]hen it appears that there is no substantial question for a three judge court to answer, dismissal of the claim for injunctive relief by the single district judge is consistent with the purpose of the three-judge statutes, and it avoids the waste and delay inherent in a cumbersome procedure." *Id.* at 611 (emphasis added); *see also Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980) ("[T]he plaintiffs have not alleged sufficient facts to raise a substantial claim requiring the convening of a three-judge court.") (emphasis added).

However, in fact, in the present context, the "substantial question" standard and the legal sufficiency standard are one and the same. In *Duckworth*, 332 F.3d 769, the Fourth Circuit clarified that where

a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73. Further, in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), a three judge panel of this Court held that "[f]or purposes of construing § 2284, we find no material distinction" between the Rule 12(b)(6) standard and the "substantial question" standard. *Id.* at 892. Therefore, the Court will apply the usual Rule 12(b)(6) standard in deciding this motion.

To pass the Rule 12(b)(6) legal sufficiency test, a complaint need only present enough factual content to render its claims "plausible on [their] face" and enable the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The plaintiff may not, however, rely on naked assertions, speculation, or legal conclusions. *Bell Atl. v. Twombly*, 550 U.S. 544, 556-57 (2007). In assessing the merits of a motion to dismiss, the court must take all well-pled factual allegations in the complaint as true and construe them in the light most favorable to the Plaintiff. *Ibarra v. United States*, 120 F.3d 472, 474 (4th Cir. 1997). If after viewing the complaint in this light the court cannot infer more than "the mere possibility of misconduct," then the motion should be granted and the complaint dismissed. *Iqbal*, 556 U.S. at 679.

III. ANALYSIS

Plaintiffs' complaint sets forth two claims. The first is a claim made under both Article I, Section 2 and the Fourteenth Amendment of the United States Constitution. (Am. Compl. at ¶ 2; ECF No. 18 at 28.) Specifically Plaintiffs "claim that the structure and

composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights." (ECF No. 18 at 28.) The second is a claim under the First Amendment to the United States Constitution. (Am. Compl. at ¶¶ 5, 23, 32, 32; ECF No. 18 at 41.) With regard to this second claim, Plaintiffs allege that "the intentional structure and composition of the challenged districts, aggravated by the operation of Maryland's closed primary election system" infringes upon their First Amendment rights as Republican voters. (ECF No. 18 at 41.)

The Court will consider these two claims in turn. However, the Court will first address Defendants' assertion that the present action is barred by *res judicata*.

A. Res judicata

In their motion to dismiss, Defendants assert that because the congressional redistricting plan at issue in this case was previously upheld in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md.), *summarily aff'd* 133 S. Ct. 29, the instant lawsuit should be dismissed under principles of *res judicata*. Ultimately, however, the Court does not find Defendants' argument persuasive.

Fletcher involved a lawsuit brought by nine African-American residents of Maryland against state election officials, in which plaintiffs alleged that the 2011 congressional redistricting plan violated "their rights under Article I, § 2, of the U.S. Constitution; the Fourteenth and Fifteenth Amendments of the U.S. Constitution; and § 2 of the Voting Rights Act of 1965 because the plan dilutes African-American voting strength within the State and intentionally dis-

criminates against African-Americans." *Id.* at 890. Particularly relevant to the case at bar is the *Fletcher* plaintiffs' claim that "Maryland's redistricting plan is an impermissible partisan gerrymander. Specifically, they argue[d] that the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the Sixth District." *Id.* at 904. The *Fletcher* Court rejected Plaintiffs' arguments on this count—and all other counts and entered judgment for the State on a motion for summary judgment. *Id.*

In this Circuit, "[f]or the doctrine of *res judicata* to be applicable, there must be: (1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and later suit; and (3) an identity of parties or their privies in the two suits." *Martin v. American Bancoporation Retirement Plan*, 407 F.3d 643, 651 (4th Cir. 2005) (quoting *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004)). With regard to the third element, under the theory of "virtual representation," a non-party whose interests were adequately represented by a party to the original action will be considered in privity with that original party. *Id.* However, virtual representation is narrowly defined:

> The doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the parties to the first suit are nor accountable to the nonparties who file a subsequent suit. In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.

Id. (quoting *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)). The essential question in determining whether the "tacit approval" requirement is met is "whether there is a disclosed relationship in which the party is accorded authority to appear as a party on behalf of others." *Id.* (quoting Restatement (Second) of Judgments § 36 (1), cmt. b (1982)).

Here, Defendants assert that there is an identity of the cause of action in both the present suit and the *Fletcher* suit. Indeed, Defendants offer that "[a]lthough not clear in every respect, the *Benisek* Plaintiffs' claims focus on the shapes of the congressional district and the effect that those shapes have on voters. Those same types of claims were litigated extensively in *Fletcher*, and there can be no doubt that the three-judge court carefully reviewed the shapes of the districts." (ECF No. 13-2 at 10.) However, at issue in *Fletcher* was the fact that "the redistricting map was drawn in order to reduce the number of Republican-held congressional seats from two to one by adding Democratic voters to the [s]ixth [d]istrict." *Fletcher*, 831 F. Supp.2d at 904. In the case at bar, however, Plaintiffs' claim regards the 4th, 6th, 7th and 8th congressional districts. Further, as Judge Titus wrote in his concurring opinion in *Fletcher*, the *Fletcher* plaintiffs "premised their claim of political gerrymandering on allegedly improper racial motivations." *Id.* at 905. In contrast, the present case does not allege any such improper racial motivations. As a result the Court is unconvinced by Defendants' argument that there is an identity of the cause of action in both this case and Fletcher.

In addition, the Court is not convinced by Defendants' claim that the *Fletcher* plaintiffs virtually represented the *Benisek* Plaintiffs. Indeed, Defend-

ants' argument, in this respect, is that the "*Fletcher* plaintiffs had exactly the same interest as the *Benisek* Plaintiffs: throwing out the plan of redistricting and drawing a new one." (ECF No. 13-2 at 11.) However, even if the Court were to credit Defendants' assertion, the doctrine of virtual representation requires more in this Circuit. Indeed, "the doctrine of virtual representation does not authorize application of a bar to relitigation of a claim by a nonparty to the original judgment where the parties to the first suit are not accountable to the nonparties who file a subsequent suit." *Martin*, 407 F.3d at 651. Here, Defendants have not shown the Court how the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs.

Defendants appear to argue that because the *Fletcher* Court gave its tacit approval to the plaintiffs in that case to act as a virtual representative of "all who claimed to be aggrieved by the [redistricting] plan," they, in fact, served as virtual representatives of the *Benisek* Plaintiffs. However, while the tacit approval requirement is necessary to establish virtual representation, it is not sufficient. *Id.* ("In addition, a party acting as a virtual representative for a nonparty must do so with at least the tacit approval of the court.") (emphasis added). Defendants have failed to show that the *Fletcher* plaintiffs were accountable to the *Benisek* Plaintiffs—an independent prerequisite—and therefore have failed to persuade the Court of their virtual representation claim.

Therefore, the Court does not find that Plaintiffs' claims are barred by *res judicata*. Ultimately, however, the Court will grant Defendants' motion on dismiss on other grounds.

B. Plaintiffs' claim under Article I, Section 2 and the Fourteenth Amendment of the United States Constitution

Plaintiffs' first claim is "that the structure and composition of the 4th, 6th, 7th, and 8th [congressional] districts constitute impermissible abridgment of representational and voting rights guaranteed under Article I, Section 2 and the 14th Amendment Sections 1 & 2." (ECF No. 18 at 28.) This claim is not one that is justiciable and therefore must be dismissed.

The courts have long struggled with their role in policing the drawing of districting maps by state legislatures. Indeed, the Constitution appears to entrust the responsibility of overseeing state legislatures in this regard primarily to Congress. Article I, Section 4 gives "state legislatures the initial power to draw districts for federal elections, [but] permits Congress to 'make or alter' those districts if it wish[es]." *Vieth v. Jubelirer*, 541 U.S. 267, 275 (2010) (plurality opinion) (quoting U.S. Const. art I, § 4). However, since *Baker v. Carr*, 369 U.S. 186 (1962), Courts have "consistently adjudicated equal protection claims in the legislative districting context regarding inequalities in population between districts," giving rise to the formulation of the "one person, one vote" rule. *Davis v. Bandemer*, 478 U.S. 109, 118 (1986) (plurality opinion), rev'd on other grounds, 541 U.S. 267 (2010); *Reynolds v. Sims*, 377 U.S. 533, 557-661 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964). Further, even where there are no population inequalities among districts, courts have "reviewed, and on occasion rejected, districting plans that unconstitutionally diminished the effectiveness of the

votes of racial minorities." *Bandemer*, 478 U.S. at 199 (collecting cases).

However, here, Plaintiffs make neither an unequal population claim nor a racial discrimination claim. Rather, Plaintiffs' claim is that because the 4th, 6th, 7th, and 8th congressional districts are composed of "de facto non-contiguous" segments, the voters in those districts—particularly those in the smaller segment of the district—are marginalized in that they enjoy decreased quality of representation and suffer a harm akin to vote dilution. (ECF No. 1 at 29.) Theirs is, in essence, a claim of political gerrymandering.

In *Davis v. Bandemer*, the Supreme Court further expanded the judiciary's role in overseeing the districting process. It ruled that political gerrymandering claims—or, as the Court phrased it, "claim[s] that each political group in a State should have the same chance to elect representatives of its choice as any other political group"—were justiciable. *Id.* at 124. The Court went on to explain that where unconstitutional vote dilution is alleged with regard to an individual district, courts should focus their inquiry "on the opportunity of members of the group to participate in party deliberations in the slating and nomination of candidates, their opportunity to register and vote, and hence their chance to directly influence the election returns and to secure the attention of the winning candidate." *Id.* at 133.

However, the *Bandemer* standard faced harsh criticism from its inception. In her dissenting opinion, Justice O'Connor noted that the *Bandemer* opinion implicitly endorsed "some use of simple proportionality as the standard for measuring the normal representational entitlements of a political party."

"[T]he plurality opinion," she continued, "ultimately rests on a political preference for proportionality—not an outright claim that proportional results are required, but a conviction that the greater the departure from proportionality, the more suspect an apportionment becomes." *Id.* at 158. The plurality's standard, she predicted, "will over time either prove unmanageable and arbitrary or else evolve towards some loose form of proportionality." *Id.* at 155.

Eighteen years later, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the Supreme Court, endorsing Justice O'Connor's dissent, reversed *Bandemer*. Indeed, the Court found that:

> Eighteen years of judicial effort with virtually nothing to show for it justify us in revisiting the question whether the standard promised by *Bandemer* exists. As the following discussion reveals, no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerg. ed. Lacking them, we must conclude that gerrymandering claims are nonjusticiable and that *Bandemer* was wrongly decided.

Id. at 281.

In so holding, the Court distinguished political gerrymandering claims from claims involving districts of unequal population. It expressly stated that the one-person, one-vote standard had "no bearing upon this question [of political gerrymandering], neither in principle nor in practicality" *Id.* at 290. With regard to principle, echoing Justice O'Connor's dissent in *Bandemer*, the Court explained that "to say that each individual must have an equal say in the selection of representatives, and hence that a majori-

ty of individuals must have a majority say, is not at all to say that each discernible group, whether farmers or urban dwellers or political parties, must have representation equivalent to its numbers." *Id.* The Constitution "guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups." *Id.* at 288.

And, with regard to practicality, the Court noted that:

> the easily administrable [one-person, one-vote] standard of population equality adopted by *Wesberry* and *Reynolds* enables judges to decide whether a violation has occurred (and to remedy it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts; whereas requiring judges to decide whether a districting system will produce a statewide majority for a majority party casts them forth upon a sea of imponderables, and asks them to make determinations that not even election experts can agree upon.

Id. at 290.

The Court in *Vieth* also highlighted the contrast between *political* gerrymandering claims and *racial* gerrymandering claims. On the one hand, "[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics." *Id.* at 285. On the other hand, "the purpose of segregating voters on the basis of race is not a lawful one." *Id.* at 286. While "[a] purpose to discriminate on the basis of race receives the strictest scrutiny under the

Equal Protection Clause, a similar purpose to discriminate on the basis of politics does not." *Id.* at 293. In rejecting a proposed test for political gerrymandering loosely based on racial discrimination cases applying § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, the Court explained:

> A person's politics is rarely as discernible—and never as permanently discernible—as a person's race. Political affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line. We dare say (and hope) that the political party which puts forward an utterly incompetent candidate will lose even in its registration stronghold. These facts make it impossible to assess the effects of partisan gerrymandering, to fashion a standard for evaluating a violation, and finally craft a remedy.

Vieth, 541 U.S. at 287.

Although the holding in *Vieth* was that the political gerrymandering claim advanced there was not justiciable, in a concurring opinion, Justice Kennedy, who provided the *Vieth* plurality with the crucial fifth vote, did leave open the door to judicial relief in future cases "if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306 (Kennedy, J., concurring). In *League of United Latin American Citizens (LULAC) v. Perry*, 584 U.S. 399 (2006), the Court explained that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must . show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.* at 418. Nonethe-

less, this reliable standard—described in *Baker* as a "judicially discoverable and manageable standard[]"—has proved elusive. 369 U.S. at 217. As this Court noted in *Fletcher*, "all of the lower courts to apply the Supreme Court's *Vieth* and *LULAC* decisions have rejected" parties' proposed standards. *Fletcher*, 831 F. Supp. 2d at 904; *see also Radogno v. Illinois State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) (reviewing seven standards the Supreme Court has rejected).

In the case at bar, Plaintiffs urge the Court to recognize that "constitutionally adequate representation must consist of more than just equal population," and they offer a "standard for judging whether minimal representational rights are afforded or abridged within the smaller segments of the 4th, 6th, 7th, and 8th districts." (Am. Compl. at ¶¶ 17, 3.) Specifically, Plaintiffs contend that "the presence of either (1) geographic or (2) demographic/political contiguity—i.e., real or de-facto contiguity or similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments—" is required by Article I, Section 2 and the Fourteenth Amendment of the Constitution.

However, the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts. Indeed, Justice Kennedy in his concurring opinion in *Vieth* specifically observed that "even those criteria that might seem promising at the outset (e.g., continuity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise politi-

cal neutrality when used as the basis for relief." *Vieth*, 541 U.S. at 308-09; *see also* M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000-1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions). And, as this Court pointed out in *Fletcher*, the Supreme Court has made clear that "[t]he Constitution does not mandate regularity of district shape." *Fletcher*, 831 F. Supp. 2d at 903 (quoting *Bush v. Vera*, 517 U.S 952, 962 (1996)).

The Court is not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness to Republicans.[4] Referring to Maryland's third congressional district, Judge Niemeyer despaired that "the original Massachusetts Gerrymander looks tame by comparison, as this is more reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Id.* at 902 n.5. Further, although "Maryland's Republican Party regularly receives 40% of the statewide vote [it] might well retain only 12.5% of the congressional seats." *Id.* at 903.

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[4] In other states, where Republicans control the state legislature, Democrats contend that they are unjustly disadvantaged by the layout of congressional districts. *See, e.g.*, Suzy Khimm, Don't Mess with Texas Democrats, Mother Jones, Sept./Oct. 2010, http://www.motherjones.com/politics/2010/08/matt-angle-texas-redistricting ("The Texas Republican [Tom DeLay], known as 'The Hammer,' had orchestrated a Machiavellian scheme to redraw the state's congressional districts and banish Democrats from power. In 2004, [U.S. Representative] Martin Frost was one of the four Texas Dems in the House picked off as a result.")

It may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case fail to provide "fair and effective representation for all citizens." *Reynolds*, 377 U.S. at 565-68. However, as the Supreme Court has made clear in *Vieth* and *LULAC*, this Court lacks "judicially discoverable and manageable standards for resolving" Plaintiffs' claim. *Vieth*, 541 U.S. at 277-281 (quoting *Baker*, 369 U.S. at 217); *see also LULAC*, 548 U.S. at 423. As a result, it is a nonjusticiable political question. The power to address Plaintiffs' concerns thus lies not with the judiciary but rather with the State of Maryland and the United States Congress. See United States Constitution art. I, § 4. Plaintiffs' claim must therefore be dismissed.

C. Plaintiffs' First Amendment Claim

Plaintiffs' second claim is that the structure and composition of the 4th, 6th, 7th, and 8th congressional districts infringe upon their First Amendment rights of political association. (Am. Compl. at ¶ 5.) As Plaintiffs explain, "[m]uch of our contention here rests on the impact on Republican voters, due to their party affiliation, resulting from the intentional structure and composition of the challenged districts and which is aggravated by the operation of Maryland's closed primary election system." (ECF No. 18 at 41.)

However, just as in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394, 401 (D. Md. 1991) and *Duckworth*, 213 F. Supp. 2d at 557-58, "nothing [about the congressional districts at issue in this case] affects in any proscribed way [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in

which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives."

Further, as the Fourth Circuit ruled in *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981), "to the extent [the First Amendment] protects the voting rights here asserted their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments [sic]."

Accordingly, Plaintiffs' claim under the First Amendment is not one for which relief can be granted, and it must therefore be dismissed.

IV. CONCLUSION

The Court therefore GRANTS Defendants' motion to dismiss (ECF No. 13) without referring the present matter to a three-judge panel.

APPENDIX C

FILED: November 12, 2014

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14-1417

(1:13-cv-03233-JKB)

O. John Benisek; Stephen M. Shapiro;
Maria B. Pycha,

Plaintiffs-Appellants,

v.

Bobbie S. Mack, Chairman; Linda H. Lamone,

Defendants-Appellees.

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge King, and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

Maryland 2011 Congressional Districts

Senate Bill 1

October 20, 2011

No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,

Petitioners,

v.

BOBBIE S. MACK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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April 2015

QUESTION PRESENTED

Did the district court correctly dismiss, as insubstantial, petitioners' partisan gerrymandering challenge to Maryland's decennial Congressional reapportionment, where the theories asserted in the complaint had been rejected by previous decisions of this Court and the suit was filed two years after the plan was enacted and more than fifteen months after the plan had been upheld by a three-judge district court's decision that this Court summarily affirmed?

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STATEMENT OF THE CASE

Maryland's 2011 Congressional Redistricting

On October 20, 2011, the Maryland General Assembly enacted, and the Governor signed into law, a new Congressional districting plan based on the results of the 2010 decennial census. 2011 Md. Laws, Special Session, ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701 – 8-709 (2014 Supp.). The enacted plan provided Maryland's 8 Congressional districts with populations as equal as mathematically possible: 7 districts had exactly the same population, and the 8th district had one additional voter because the State's population as determined by the census was not evenly divisible by 8.

Within months after the plan's enactment, this Court had an opportunity to consider Maryland's reapportioned Congressional districts. In *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), a group of plaintiffs challenged the plan on grounds that included allegations of racial gerrymandering and partisan gerrymandering. On December 23, 2011, a three-judge district court rejected all claims and unanimously upheld the plan's constitutionality. This Court summarily affirmed on June 25, 2012. 133 S. Ct. 29 (2012). During that same period, the plan also survived two other court challenges. *Gorrell v. O'Malley*, Civil No. WDQ–11–2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 F. App'x 150 (July 12, 2012); *Olson v. O'Malley*, Civil No. WDQ–12–0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

The Petitioners' 2013 Lawsuit

The petitioners filed this suit for injunctive relief objecting to the "structure" and "composition" of Congressional districts on November 5, 2013, Resp. App. 2 (Complaint ¶ 2) – more than two years after the plan was enacted; more than 15 months after the plan had survived challenges in three other federal cases, including one that resulted in this Court's summary affirmance; and a year after voters in the redrawn districts had gone to the polls to elect their representatives to Congress.

The petitioners' complaint did not allege that Maryland's Congressional districts offended any constitutional or statutory principles pertaining to equality of district population, race, or any other suspect classification. Instead, the complaint asserted that rights of "representation" under Article I, Section 2 and the First and Fourteenth Amendments of the Constitution were denied to residents of certain districts to the extent the districts lacked "either (1) geographic or (2) demographic/political commonality—i.e., real or de-facto contiguity OR similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments." Resp. App. 3 (Complaint ¶ 3; emphasis and parentheses in original).

The complaint conceded that "the enacted districts are technically contiguous" but contended – without citation to any supporting authority – that "[i]f there is an actual or perceived requirement for the districts to be technically contiguous, then it follows that such

districts must be de-facto contiguous as well – i.e., not connected through just a narrow ribbon or orifice. . . ." Resp. App. 19 (Complaint ¶ 25). The complaint acknowledged the lack of any "Constitutional or statutory mandate" for the contiguity requirements the petitioners advocate, Resp. App. 17 (Complaint ¶ 24(b)), and recognized that what it termed "non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights," Resp. App. 16 (Complaint ¶ 22). The complaint nonetheless asserted that an "impermissible abridgement" results when "*de facto*" noncontiguity is "combined with disparity in demographics," *id.* (emphasis in original), or, rather, disparity in "political views and the demographic factors that shape them," *id.* The "demographic factors" petitioners advocated as appropriate indicators of demographic "contiguity" included race, ethnicity, and socioeconomic status. Resp. App. 21 (Complaint ¶ 29); *see also* Resp. App. 6 (Complaint ¶ 11 (complaining that segments within challenged districts are "socioeconomically, demographically, and politically inconsistent")).

The complaint suggested that the supposed requirement of "de-facto contiguity" could be satisfied either through "geographic" means, by "strik[ing] the use of narrow ribbons and orifices," Resp. App. 14 (Complaint ¶ 18), or alternatively through something the complaint termed "demographic contiguity," Resp. App. 15 (Complaint ¶ 21), which the petitioners equate with homogeneity or commonality of "shared interests–demographic, ethnic, racial, socioeconomic, and political," Resp. App. 21-22 (Complaint ¶ 29).

Thus, in the petitioners' view, the use of "narrow ribbons" and "orifices" to join "non-contiguous" areas is permissible if the result is to create a district with greater "similarity of political views" and other "demographic factors," Resp. App. 16 (Complaint ¶ 22), but another district with an identical geographic configuration or shape would run afoul of the Constitution if it linked areas with "demographically discordant" populations, *id.*, meaning groups of persons who are "socioeconomically, demographically, and politically inconsistent" with each other, Resp. App. 6 (Complaint ¶ 11).

Although the complaint alleged that an "abridgement" caused by "the design and demographics" of four of the districts (the 4th, 6th, 7th and 8th districts) "impacts only areas with highly Republican voting history," Resp. App. 17 (Complaint ¶ 23), the petitioners insisted that "the focus of [their] claim is not so much that the State incorporated too much focus on impermissible partisan gerrymandering," Resp. App. 3 (Complaint ¶ 2). The complaint further acknowledged that the "geographic factors" petitioners emphasize "do not guarantee" either "effective representation" or "fairness," and conceded that the relief sought by the petitioners "will *not* eliminate gerrymandering." Resp. App. 20 (Complaint ¶ 27). The petitioners specified that the relief they sought did *not* "include changing the overall (7 Democratic – 1 Republican) partisan make-up of the enacted districts." Resp. App. 3 (Complaint ¶ 2; parentheses in original).

Attached to the complaint were exhibits that included 6 districting plans, designated as Options A through E, which the petitioners proposed as potential remedies that would implement the districting concepts advocated in the complaint. Resp. App. 56. As indicated by the district population table appearing to the left of each proposed alternative map, the plans petitioners offered had districts deviating from the ideal equal population by as many as 760 persons, Resp. App. 56 (Ex. 11, Option A, Exhibit 15, Option D, Exhibit 16, Option E), and population variances between districts of as many as 1,103 persons, Resp. App. 56 (Ex. 11, Option A). Unlike Maryland's enacted plan, which achieved the maximum equality of district population mathematically possible, none of the district plans proposed by the petitioners purported to come close to the "precise mathematical equality" that this Court has demanded of Congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *see Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("[T]he command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.").

After filing their initial complaint, the petitioners requested and were granted leave to file an amended complaint. Resp. App. 28. The amended complaint retained nearly all of the text of the original complaint but added a "Supplemental Request for Relief," which unlike the petitioners' "Primary requested relief," Resp. App. 51-53 (Amended Complaint ¶¶ 34, 35), advocated "less deference to the legislature's intent,"

Resp. App. 53 (Amended Complaint ¶ 36). The Supplemental Request for Relief specifically asked the district court, as an alternative, to combine "the small sections of the 6th, 8th, and 7th districts," which "are predominantly Republican in voting history," thereby effectively creating a statewide map with "6 Democratic and 2 Republican districts." Resp. App. 53 (Amended Complaint ¶ 36).

The District Court's Decision

The defendants moved to dismiss the complaint. Invoking the authority of a single district judge in Congressional redistricting challenge to "determine[] that three judges are not required," Pet. App. 6a (quoting 28 U.S.C. § 2284(b)(1)), the district court proceeded to grant the motion and reject all of the petitioners' claims. The district court discerned that the petitioners' claims fell into two categories: (1) a claim under Article I, Section 2 and the Fourteenth Amendment alleging that "the structure and composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights," Pet. App. 8a-9a, and (2) a claim under the First Amendment alleging that "'the intentional structure and composition of the challenged districts, aggravated by the operation of Maryland's closed primary election system,' infringes upon their First Amendment rights as Republican voters," *id.* at 9a (citation omitted).

The district court then concluded that the petitioners' claim under Article I, § 2 and the Fourteenth Amendment was "in essence, a claim of political gerrymandering," Pet. App. 14a, one that is

precluded by precedent for two reasons: (1) this Court has held that a partisan gerrymandering claim is unavailable in the absence of "'judicially discernible and manageable standards for adjudicating'" such claims, *id.* 15a (quoting *Vieth v. Jubilier*, 541 U.S. 267, 281 (2004)), and (2) "the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts," *id.* 18a (citing *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring) ("[E]ven those criteria that might seem promising at the outset (*e.g.*, contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief."). *See also* Pet. App. 18a (citing *Radogno v. Illinois State Bd. of Elections*, No. 1:11–cv–048842011, WL 5868225, at *2-*3 (N.D. Ill. Nov. 22, 2011) (reviewing seven "standards [for partisan gerrymandering] the Supreme Court has rejected").

The district court also determined that precedent barred the petitioners' claim under the First Amendment, which is similar to those claims asserted and rejected in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), *rehearing denied*, 505 U.S. 1230 (1992); and in *Duckworth v. State Board of Elections*, 213 F. Supp. 2d 543, 557-58 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003). The district court observed that, just as in those cases, "'nothing [about the congressional districts at issue in this case] . . . affects in any proscribed way [P]laintiffs' ability to participate in the political debate in any of the

Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.'" Pet. App. 20a-21a (quoting *Duckworth*, 213 F. Supp.2d at 557-58; brackets in original (quoting *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401)). The district court also quoted the Fourth Circuit's holding in *Washington v. Finlay*, 664 F.2d 913, 927 (4th Cir. 1981), that "'to the extent [the First Amendment] protects the voting rights here asserted their protections do not in any event extend beyond those more directly, and perhaps only, provided by the fourteenth and fifteenth amendments [*sic*].'" Pet. App. 21a.

The Court of Appeals for the Fourth Circuit affirmed in an unpublished per curiam decision, Pet. App. 1a-2a, and subsequently denied the petitioners' request for rehearing and rehearing en banc, *id.* at 22a.

REASONS FOR DENYING THE WRIT

THE PETITION DOES NOT PRESENT A SUBSTANTIAL QUESTION OF FEDERAL LAW.

Further review is unwarranted because the unpublished decision of the Court of Appeals correctly affirmed the district court's dismissal of the petitioners' insubstantial claims, which are founded on theories this Court has previously rejected. This case presents an especially poor vehicle for addressing the question posed in the petition, because the petitioners' claims are insubstantial and will remain eminently dismissible irrespective of how the Court might answer the question. This case is also unrepresentative of typical reapportionment challenges due to its peculiar circumstances, most notably the petitioners' unexplained two-year delay before filing suit to challenge the enactment of Maryland's decennial Congressional districting plan, after the plan already had been reviewed by a three-judge district court and upheld by this Court in *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012), and after the plan already had been implemented in the 2012 Congressional elections.

A. The District Court Properly Dismissed the Petitioners' Claims As Insubstantial.

Under this Court's precedent interpreting the statutory language now codified in 28 U.S.C. § 2284,[1] a complaint challenging the constitutionality of the apportionment of congressional districts may be dismissed by a single district judge, without first convening a three-judge court, when the plaintiff's "constitutional attack is insubstantial," that is, "'obviously without merit.'" *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (citation omitted); *see McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975) (same).

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[1] 28 U.S.C. § 2284 provides in pertinent part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
>
> (b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, *unless he determines that three judges are not required*, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. . . .

(Emphasis added.)

In this case, the dismissal of the amended complaint was within the single district judge's authority under 28 U.S.C. § 2284(b)(1) and this Court's precedent, because the petitioners' claims are "obviously without merit" and "their unsoundness" is made clear by "previous decisions of this court." *Ex parte Poresky*, 290 U.S. 30, 32 (1933). As the district court below determined, the petitioners' theory or "standard" for addressing alleged partisan gerrymandering under Article I, Section 2 and the Fourteenth Amendment "is, in substance, markedly similar to tests that have already been rejected by the courts," including this Court. Pet. App. 18a. The petitioners' preoccupation with the shapes of districts, their variations on the theme of contiguity, and their belief that district boundaries should be drawn to link populations of common interests, socioeconomic status and political views, all merely constitute a restatement of various standards that this Court has deemed unacceptable as a basis for a partisan gerrymandering claim.[2] Though the petitioners

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[2] *See Vieth*, 541 U.S. at 281-82 (plurality opinion) (rejecting as partisan gerrymandering standard "'both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group'" (citation omitted)); *id.* at 290-91 (rejecting as standard "whether district boundaries had been drawn solely for partisan ends to the exclusion of 'all other neutral factors relevant to the fairness of redistricting,'" with the "most important" factor being "'the shapes of voting districts and adherence to established political subdivision boundaries'" (citation omitted)); *id.* at 284 (rejecting as standard whether "mapmakers acted with a predominant intent to achieve partisan advantage," as shown by evidence "that other neutral and legitimate redistricting criteria were subordinated

claim to find support in Justice Kennedy's concurrence in *Vieth*,[3] Petition at 27 (citing *Vieth*, 541 U.S. at 314-15), as the district court rightly noted, Pet. App. 18a, the same concurring opinion concluded that geographic criteria such as those espoused by the petitioners have proved unworkable:

> [E]ven those criteria that might seem promising at the outset (e.g., contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not. For example, if we

---

to the goal of achieving partisan advantage"); *id.* at 295-96 (rejecting five-part test requiring plaintiff to show "(1) that he is a member of a 'cohesive political group'; (2) 'that the district of his residence. paid little or no heed' to traditional districting principles; (3) that there were 'specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group'; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that 'the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group'" (citation omitted)); *id.* at 299 (rejecting as standard "'the unjustified use of political factors to entrench a minority in power'" (citation omitted)).

[3] In *Vieth*, four justices joined the plurality opinion, and Justice Kennedy wrote separately concurring in the judgment.

> were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another.

Vieth, 541 U.S. 308-09 (Kennedy, J., concurring in the judgment).

In setting forth their partisan gerrymandering claim and citing repeatedly to *Wesberry*, the petitioners seek to give their notions of "*de facto* contiguity" and "demographic contiguity" a constitutional significance on par with that of district population equality, which this Court has pronounced "the paramount objective of apportionment," *Karcher v. Daggett*, 462 U.S. 725, 732 (1983). *See* Resp. App. 40 (Amended Complaint ¶ 17 (asserting that lack of "real geographic contiguity or some degree of demographic or political commonality" would be tantamount to having districts of unequal population)). The petitioners' misguided effort to elevate geographic and political considerations and to equate them with the mandate of population equality directly conflicts with this Court's precedent. *See Vieth*, 541 U.S. at 290 ("Our one-person, one-vote cases. have no bearing upon this question [of partisan gerrymandering], neither in principle nor in practicality.") (citing *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry*, 376 U.S. 1). As demonstrated by the comparatively large population deviations and variances in the district maps that the petitioners have proposed as alternative remedies, Resp. App. 56 (Exs. 11-16), the petitioners' theory appears to be

incompatible with the "precise mathematical equality" that precedent requires of Congressional districts. *Kirkpatrick*, 394 U.S. at 530-31.

As for the petitioners' First Amendment claim, the district court correctly concluded that the petitioners could not satisfy the applicable standard used in a prior decision that this Court summarily affirmed, *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401, as well as Fourth Circuit decisions rejecting similar claims, *Duckworth*, 213 F. Supp. 2d at 557-58; *Washington*, 664 F.2d at 927. Although not binding on this Court, summary affirmances do bind lower federal courts and "do prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977).

B. The Petitioners' Dilatory Pursuit of Their Redistricting Challenge Makes This a Poor Vehicle for Examining the Three-Judge District Court Statute.

Finally, the policies underlying the three-judge district court statute would be ill-served by granting further review in this case, which was filed more than 15 months after this Court had already upheld the same Congressional reapportionment in *Fletcher v. Lamone*, 133 S. Ct. 29 (2012). As this Court has recognized, the precursor of 28 U.S.C. § 2284 was enacted, not for the benefit of plaintiffs who might object to federal and state enactments, but to protect enacted statutes from being struck down improvidently: "Congress established the three-

judge-court apparatus for one reason: to save state and federal statutes from improvident doom, on constitutional grounds, at the hands of a single federal district judge." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 97 (1974); *see Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965) ("The three-judge district court is a unique feature of our jurisprudence, created to alleviate a specific discontent within the federal system," that is, "to assuage growing popular displeasure with the frequent grants of injunctions by federal courts against the operation of state legislation. "). The statute "authorizes direct review by this Court, as a means of accelerating a final determination on the merits," *not* because such a departure from normal appellate procedure was deemed necessary to aid plaintiffs disappointed by a dismissal of their complaint; instead, the streamlining of procedure and availability of direct Supreme Court review were adopted by Congress to reduce "the length of time required to appeal and *the consequent disruption of state programs* caused by the outstanding injunction." *Id.* at 119-20 (emphasis added).

This interest in protecting state statutes and avoiding disruption of state programs, which undeniably prompted the enactment of what is now 28 U.S.C. § 2284, would not be served by prolonging the petitioners' belated and properly dismissed challenge to Maryland's 2011 Congressional reapportionment. The petitioners themselves acknowledge that redistricting cases are "time-sensitive," and that "delay may also undermine the underlying purpose of the suit." Petition at 23, 22.

For this very reason, one of the criteria for whether to convene a three-judge court asks whether the complaint "alleges a basis for equitable relief," *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962), and courts have held that a plaintiff's delay in bringing a redistricting challenge and the resulting threat of disrupting the election process may render a claim insubstantial due to the unavailability of injunctive relief, *see, e.g.*, *Simkins v. Gressette*, 631 F.2d 287, 290, 295-96 (4th Cir. 1980) (insubstantiality of claim may result "because injunctive relief is otherwise unavailable"); *Maryland Citizens for a Representative General Assembly v. Governor of Maryland*, 429 F.2d 606, 611 (4th Cir. 1970) (same); *MacGovern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986) (same); *c.f.*, *Reynolds*, 377 U.S. at 585 (in awarding or withholding relief, a court should "endeavor to avoid a disruption of the election process").

By addressing these and similar concerns in the three-judge statute, Congress intended to protect the states' interest in maintaining the integrity of their enactments, not to encourage or facilitate a suit such as the one the petitioners filed more than two years after Maryland enacted its Congressional plan, and more than fifteen months after the plan had already survived review by a three-judge district court and this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 2015

APPENDIX

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No.: JKB-13-CV-3233

[Filed November 5, 2013]

O. JOHN BENISEK
11237 Kemps Mill Rd
Williamsport, MD 21795
Washington County

STEPHEN M. SHAPIRO
5111 Westridge Rd
Bethesda, MD 20816
Montgomery County

MARIA B. PYCHA
13612 Brookline Rd
Baldwin, MD 21093
Baltimore County

v.

BOBBIE S. MACK, Chairman,
Maryland State Board of Elections
151 West Street, Suite 200
Annapolis, MD 21401
Anne Arundel County

LINDA H. LAMONE
State Administrator of Elections
151 West Street, Suite 200
Annapolis, MD 21401
Anne Arundel County

In their official capacities

* * * * * * * *

COMPLAINT

[***Table of Contents omitted
for purposes of this Appendix***]

Jurisdiction

1. Jurisdiction is based on a Federal question (provisions of the United States Constitution).

Overview of claim

2. Understanding that this Court has previously found the Congressional Districts established by the General Assembly of Maryland, specifically Sections 8-702 through 8-709 of the Election Law Article, not to be a "partisan gerrymander" (*Fletcher v. Lamone*) in violation of the 14th Amendment, we contend that the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts impermissibly abridge our rights, and those of similarly situated Marylanders, of representation as protected by Article 1 Section 2 of the U.S. Constitution; our right to vote for our Representatives to Congress, as protected by both the first and second clauses to the 14th Amendment to the U.S. Constitution; and our First Amendment rights of political association. Our claim is

distinct from the partisan gerrymandering claim decided in *Fletcher* in that we are challenging the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts—and not the overall partisan make-up of the state's Congressional districts. This is a critical and significant distinction--which does not rely on the reason or intent of the legislature—partisan or otherwise--in its incorporation of these features, and this distinction impacts both the standard we offer for determining the adequacy of representational rights as well as the requested relief to restore such abridged rights. Such relief includes elimination of the orifices and ribbons but does not include changing the overall (7 Democratic – 1 Republican) partisan make-up of the enacted districts. Therefore the focus of our claim is not so much that the State incorporated too much focus on impermissible partisan gerrymandering—but rather that the State incorporated too little focus on affording adequate representation to voters in the abridged sections of the 4th, 6th, 7th and 8th districts. We take this action now to obtain relief—prior to 2022—for the over 700,000 Marylanders who live in the parts of these districts where their representational rights are infringed, and to ensure that future maps afford greater regard for representational rights.

3. We contend that the presence of either (1) geographic or (2) demographic/political commonality —i.e., real or de-facto contiguity OR similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments—is a manageable standard for judging whether minimal representational rights are afforded or abridged within the smaller segments of the 4th, 6th,

7th, and 8th districts. This standard reflects the impermissible abridgement of the representational rights of voters within these smaller sections as a logical extension of *Wesberry v. Sanders (376 U.S. 1)*, notwithstanding the broad authority of the State of Maryland to determine the boundaries of such districts under Article 1 Section 4 of the U.S. Constitution and to regulate elections. As we demonstrate in paragraphs 14 & 15, federal courts are already making similar judgments as extensions of *Wesberry*.

4. We recognize that under current case law, States have very broad discretion under the Constitution to fashion Congressional districts as they see fit to bring about the political and other objectives desired by the legislature. However, as established by *Wesberry*, voters also have representational rights under the Constitution—and we contend that States must afford a modicum of respect to those representational rights, including but not limited to equal population, regardless of the other factors or objectives the State opts to take into account when exercising its authority and responsibility to establish Congressional districts.

5. In addition to infringement of representational and voting rights, we also claim that the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in the 2008 Presidential election. The abridgement of representational, voting, and association rights is exacerbated by the significant differences in size between the discrete segments of each district, and Maryland's closed primary system for electing Representatives to Congress.

6. We respectfully request that the Court convene a 3-member District Court to further consider our claims under 28 U.S.C. 2284 and to grant relief to include enjoining the defendants from holding the 2014 elections for Representatives to Congress using the current districts in Sections 8-702 through 8-709 of the Election Law Article, and by revising the boundaries of such districts to be used for the 2014-2020 elections in a manner that resolves the abridgement. We have attached examples of prospective maps that resolve the abridgement, while maintaining the legislature's intent to the fullest extent practicable.

Relevant Facts:

7. The 2010 Census allocated Maryland eight Representatives in Congress, the same number as in recent decades.

8. In October 2011, the Maryland General Assembly enacted Senate Bill 1, creating the state's current Congressional districts (shown in Exhibit 1), codified in Sections 8-702 through 8-709 of the Election Law Article, during a special session called by the Governor to consider new Congressional districts that he proposed following the 2010 Census. The Governors' proposal closely followed the districts recommended by the Governor's Redistricting Advisory Committee (GRAC). The GRAC, which included the Senate President and House Speaker, provided explanations for its recommendations in Exhibit 2. Senate Bill 1 was subsequently petitioned to referendum by voters opposed to the Bill, as provided by the Maryland Constitution. After being petitioned to referendum, it was ratified by the voters in the November 2012 General Election. However, litigation challenging the

ratification over the clarity of the ballot language drafted by the Maryland Secretary of State is pending before the Maryland Court of Special Appeals (*Parrott v. McDonough*).

9. Maryland's Congressional districts were reviewed by this Court in December 2011 in *Fletcher v Lamone*, in which those plaintiffs claimed violations of the Voting Rights Act as well as that the new districts constituted a state-wide partisan gerrymander under *Davis v Bandemer*. This Court found no violation of the Voting Rights Act and denied the state-wide partisan gerrymander claim pursuant to *Vieth v Jubelirer*.

10. Several of the newly enacted districts contain de-facto non-contiguous segments—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments; such districts are essentially identical to those that would exist without such orifices or ribbons.

11. The 4th, 6th, 7th, and 8th districts each consist of two distinct segments—one segment of which being far more populous than the other as well as being socioeconomically, demographically, and politically inconsistent with the other segment. In each of these districts, the larger and smaller sections are technically connected through a narrow ribbon or orifice. Thus they are essentially or de-facto non-contiguous.

12. Exhibits 3-10 are maps of the dominant and smaller sections of these districts, which are described below.

(a) (1) Exhibits 3&4 show the dominant and smaller sections of the 4th Congressional District. This district

is a majority African-American district that was first developed in 1990 to account for the increasing population of African-American residents within Prince George's County. The dominant portion of the 4th district is centered in the portion of Prince George's County within the Capital Beltway and bordering the District of Columbia. This portion of the district contains 450,000 residents who are predominantly (74%) African-American (and 16% Hispanic and 6% white), urban, lower-middle income, and overwhelmingly Democratic voters. President Obama received 96% of the vote within this portion in 2008. This segment is attached through a narrow ribbon to the smaller segment of 185,000 residents in northeastern Anne Arundel County who are predominantly outer-suburban, 84% white (and 7% black and 4% Hispanic), middle income, and predominantly Republican voters. President Obama received 42% of the vote within this portion in 2008. These Anne Arundel residents share little in common with their Prince George's counterparts that is relevant to effective or meaningful representation.

(2) Given the composition of this district, its Representative will be elected by the voters of the Prince George's segment, and will almost certainly be a Democrat. Indeed, if the very different voters of the Anne Arundel segment could have any significant impact on the outcome, then the district would almost certainly be in violation of the Voting Rights Act due to dilution of African-American voters—and this Court found no such violation in *Fletcher v Lamone*. As practical matter, the election of the district's Representative will be determined by the Democratic primary election.

(b) Exhibits 5&6 show the dominant and smaller sections of the 6th Congressional District. The population of this district is centered in Montgomery County, Maryland's largest county. Its population is overwhelmingly suburban and Democratic. Its residents live and work primarily in the Washington, D.C. metropolitan area. The dominant Montgomery and southern Frederick County segment of the district contains 470,000 residents. This portion is 52% white, 15% African-American, and 15% Hispanic. President Obama received 66% of the vote of this segment in 2008. This segment is connected to Maryland's three westernmost counties, containing 250,000 residents, through a narrow orifice at the southern end of the Washington-Frederick county line. These three counties are predominantly rural, with significant industries including agriculture, railroads, energy, and mining in the far west. Economically the region is relatively depressed, as manufacturing activity has decreased in recent years. Politically it is predominantly Republican; minorities are few in number. This abridged segment is 86% white, 8% African American, and 3% Hispanic. President Obama received 39% of this segment's vote in 2008. Plaintiff John BENISEK is a Republican resident of this segment.

(c) Exhibits 7&8 show the pieces of the 7th District. This district is centered within Baltimore City—in wards containing 400,000 residents who are almost exclusively African-American, urban, lower-middle income, and Democratic. The district extends in a contiguous fashion to the southwest, picking up 200,000 residents from adjacent similar areas of Baltimore County and from contiguous but less

demographically similar sections of Howard County—which includes a mixture of white, African-American, middle and upper income, Democratic and Republican, and suburban and rural voters. Overall, this dominant contiguous section contains 600,000 residents who are 59% African-American, 29% white, 3% Hispanic. President Obama received 80% of this segment's vote in 2008. Attached to this district through a narrow ribbon is a wholly inconsistent and de-facto non-contiguous abridged segment of 45,000 voters in northern Baltimore County. This area is overwhelmingly (89%) white (and 2% African-American and 2% Hispanic), rural and suburban, middle-upper income, and predominantly Republican—comprising some of the most heavily Republican precincts in the entire state. President Obama received 37% of this segment's vote in 2008. Maria PYCHA is a Republican resident of this segment. Overall the 7th District is an African-American majority district as required by the Voting Rights Act. Like the 4th District, its Representative will be a Democrat who will be elected in the Primary; the General Election will be of no consequence in the 7th

(d) Exhibits 9&10 show the 8th District. This district contains 470,000 voters in southern Montgomery County—which is multi-ethnic, suburban, largely but not entirely affluent, and overwhelmingly Democratic. This dominant segment is 53% white, 15% African-American, and 18% Hispanic. President Obama received 76% of this segment's vote in 2008. Stephen SHAPIRO is a Democratic resident of this segment. This segment connects, through a narrow orifice, to 230,000 de-facto non-contiguous residents of northern Frederick Co. and Carroll Co. This northern segment is

89% white, 4% African-American, and 4% Hispanic. President Obama won 39% of this segment's vote in 2008. The 8th District's Representative will also be a Democrat who will be elected in the Primary; the General Election will be a technicality.

Review and Application of Relevant Case Law:

13. Early in the prior century, Congress determined that, as a matter of policy pursuant to its authority under Article 1 Section 4 of the U.S. Constitution, Congressional districts should be compact, contiguous, and of equal population (Reapportionment Act of August 8, 1911). The U.S. Supreme Court determined in 1932 that those policy requirements only applied to districts created pursuant to the 1910 Census and were no longer in effect (*Wood v Broom, 287 U.S. 1*). However, three decades later, the Supreme Court determined in *Wesberry v Sanders* (376 U.S. 1) that districts must have equal population as a representational right under Article 1 Section 2 of the U.S. Constitution. The Supreme Court also held in *Wesberry* that claims regarding Congressional redistricting are justiciable, that voters within a State have standing to make such claims, that legislatures may not "draw lines in such a way as to give some voters a greater voice in choosing a Congressman than others," that the right to vote is embodied within Article 1 Section 2 of the U.S. Constitution, and that the right to vote extends beyond just casting a ballot, but to have that ballot count equally. It is noteworthy that the dissenters in *Wesberry* raised objections similar to the plurality in *Vieth* regarding manageability. However, courts have subsequently

managed *Wesberry* cases, making essentially similar judgments to what we propose now.

14. Federal courts have already exercised similar case-by-case judgment in ruling on redistricting cases regarding equal population—i.e., deciding whether Congressional districts that are not of precisely equal size do or do not afford adequate representation. Under *Wesberry*, states have typically been held to a very tight standard for Congressional districts, with almost no variations in size permitted. In *Karcher v Daggett* (462 U.S. 725), the U.S. Supreme Court found New Jersey did not have adequate justification for a redistricting map with less than 0.7% difference in population among districts. However, in *Tennant v Jefferson County*. (567 U.S.), the Supreme Court decided that West Virginia did have an acceptable basis for a 0.79% difference in population among districts—i.e., to avoid splitting counties. The *Karcher* and *Tennant* judgments are essentially the same judgments we are asking this Court to make in this current instance. The small (0.7% & 0.79%) variances in population within those cases were representationally insignificant. The districts in those cases were essentially approved or disapproved by the Court based on other aspects affecting the adequacy of representation afforded by those districts. Given those cases, it is almost inconceivable that the current Maryland maps would have survived earlier judicial scrutiny if our new districts had anything approaching a mere 0.7% population variance. The paucity of representation afforded within the abridged sections of Maryland's 4th, 6th, 7th, and 8th districts should not be immunized by this Court only because there is no population variance among the overall districts.

15. Federal courts have made similar judgments regarding state legislative redistricting pursuant to *Baker v. Carr* (39 U.S. 186) and *Reynolds v. Simms* (377 U.S. 533). In *Gaffney v Cummings*, the U.S. Supreme Court noted that state legislative districts are held to a less strict standard than for Congressional districts, and upheld state house districts with a 7.8% variance. Variances within 10% had been generally viewed as within a state's prerogative for legislative districts—i.e., a "safe harbor." However, in *Cox v Larios* (542 U.S.) the Supreme Court clarified that there is no absolute safe harbor, even for legislative districts, and ruled that a Georgia map with variances less than 5% was impermissible as the variations were made for unacceptably partisan purposes, rather than to better afford representation—such as by not dividing jurisdictions. Implementation of the standard we suggest on a district-by-district basis is similarly manageable as the equal population cases noted above and in paragraph 13.

16. The second clause of the 14th Amendment to the U.S. Constitution would require reduce a state's apportionment where the right to vote for Representatives "is in any way abridged." This clause, in combination with the Equal Protection Clause as well as Article 1, serves as an outright prohibition against abridging the right to vote in any way—as the Equal Protection Clause and Article 1, under *Wesberry*, would not permit a state to take an action which would reduce its apportionment and the voice of its voters.

17. Under *Wesberry*, the Supreme Court held that voters have representational rights under Article 1 that States must respect when determining Congressional

districts. The Supreme Court held in *Baker v Carr* (369 U.S. 186) that that voters hold similar voting rights under the 14th Amendment that States must respect when determining Congressional and legislative districts. If, per *Wesberry* and *Baker*, districts established by the State must afford its residents a modicum of representational and voting rights, then it is a logical extension to conclude that such constitutionally adequate representation must consist of more than just equal population. If residents do not share either real geographic contiguity or some degree of demographic or political commonality, then they enjoy no more representational or voting rights than if their districts were of significantly unequal size; in fact, the voters within the abridged sections of these districts enjoy less adequate representation than if they were combined into adjacent but oversized districts.

18. In *Vieth*, a plurality of the U.S. Supreme Court held that partisan gerrymandering claims are not justiciable due to the lack of judicially discoverable and manageable standards as to what constitutes state-wide partisan gerrymandering. *Bandemer* and *Vieth* (and *Fletcher*) addressed allegations of discrimination against voters of a political party as a class. The plurality in *Vieth* and the minority in *Bandemer*—who raised concerns similar to the *Vieth* plurality—felt the Judiciary is not equipped to make judgments as to whether a state-wide districting map unconstitutionally burdens members of a political party. Our claim requires no such judgment. The standard we propose to effectively strike the use of narrow ribbons and orifices to link inconsistent segments is more relevant and manageable than

determining how much partisanship is too much for a state-wide configuration. This is demonstrated in paragraph 35, where we compare our requested relief with the relief to rectify state-wide partisan gerrymandering.

19. Justice O'Connor, in concurring on the Court's judgment in *Bandemer*, contrasted that case's assertion of group rights to an equal share of power and political representation with other cases protecting the rights of individuals to vote. She quoted from *Reynolds v Simms* (377 U.S. 533) "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." The construction of these 4th, 6th, 7th, and 8th districts dilutes—and largely marginalizes—the votes of residents within their abridged sections. A potentially decisive vote is worth more than a vote that is, through its design, negligible.

20. While the *Vieth* plurality held that prospective standards for determining unacceptable state-wide partisan gerrymandering were not sufficiently manageable, Justice Scalia noted in *Vieth* that "courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear." The courts have already exercised such case-by-case judgment in ruling on redistricting cases regarding equal population—i.e., deciding when states may or may not implement districts not of equal size—as noted in paragraphs 14 & 15. The two elements of the standard

we suggest here is similarly manageable for protecting representational rights.

21. In *LULAC v Perry* (548 U.S.), Justice Kennedy wrote that "judicial respect for legislative plans (for Congressional redistricting), however, cannot justify legislative reliance on improper criteria for districting determinations." He also held that standard for statewide gerrymandering offered by the plaintiffs in *LULAC* (mid-decade redistricting with partisan intentions) was insufficiently reliable as it would produce different results for a regular decennial redistricting. However, the standard we propose for this case—a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity—is far more reliable for reviewing individual districts than the statewide standard that was dismissed in *LULAC*. Our proposed standard would not yield variable results, as the Court found to be the case with the proposed state-wide *LULAC* standard. Justice Kennedy also wrote in *LULAC* that "Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." This suggests that States, in exercising their responsibility for redistricting under Article 1 Section 4, have a responsible to do so in a manner consistent with affording its citizens their representational rights under Article 1 Section 2. It also suggests that while State legislatures certainly have the expertise to create

districts that are wise, fair, rational, and ensure citizen participation—as well as the responsibility to enact districts that comport with the U.S. Constitution--it is a stretch to presume that a State has in fact done either, particularly when the district-by-district test we suggest for representational rights is clearly not met.

22. We contend that the design and demographics of the 4th, 6th, 7th, and 8th districts—i.e., lack of contiguity whereas the discrete small section of each of these districts is geographically AND demographically discordant with the larger segment, represents an abridgement of the representational rights of voters in such smaller sections under Article 1, analogous to *Wesberry*, as well as their voting rights under Clauses 1 and 2 of the 14th Amendment. The "AND" as used above is significant to our contention. Justice Scalia, writing for the Supreme Court plurality in *Vieth*, held that non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights. Our contention is that such non-contiguity, when combined with disparity in demographics does constitute an impermissible abridgement of such rights within the smaller segment. Both defects together constitute a greater degree of abridgement than either alone. Voters in the smaller sections share with those of the dominant sections neither the proximity of neighbors nor the similarity of political views and the demographic factors that shape them. Odds are remote that representatives selected by voters of the dominant sections can ably, effectively, or empathetically represent voters in the smaller abridged sections. Representational rights are more than just casting a marginalized vote. While the Supreme Court has been reluctant to accept a "totality of the

circumstances' standard for state-wide partisan gerrymandering, our proposed standard is a more straightforward and decisive district-by-district measure for representational adequacy.

23. We also contend that since the abridgement impacts only areas with highly Republican voting history, it also constitutes violation of the First Amendment's protection of political association—along the lines suggested by Justice Kennedy in his concurrence in *Vieth*. In this regard, while we are neither claiming nor requesting relief from state-wide partisan gerrymandering, we certainly would not object to such a finding.

24. (a) Even though the Supreme Court has not held geographic contiguity alone to be a litmus test for representational rights, there is a long history of contiguity being considered important or required by Congress or state legislatures on policy grounds—similar to the history of requirements for equal population.

(b) Our point in providing this historical review is not to establish that there is a current Constitutional or statutory mandate for contiguous districts, but rather to establish that contiguity has long been considered a traditional districting principal for affording representation--and is therefore a proper element for a standard, such as we have offered, to determine whether requisite representation has been afforded under Article 1 Section 2 of the U.S. Constitution.

(c) Contiguity was the first redistricting standard imposed by Congress, which first required districts be contiguous in 1842 (5 Stat 491). That law also required

districts to be single-member. Equal population, in addition to contiguity, was mandated in 1872 (17 Stat 492), the same year that Congress codified the 2nd clause of the 14th Amendment (17 Stat 29). Compactness was added as a later requirement in 1901 (26 Stat 736). These three standards were continued in the Apportionment Act of August 8, 1911 (37 Stat 13). Congress did not mandate any of these standards further until after *Wesberry*, when Congress restored the single member district requirement in 1967 to prevent at-large voting for Representatives (81 Stat 581). When the House of Representatives passed districting legislation in 1967, the Judiciary Committee issued House Report 90-191, augmenting requirements for equal size, compact, and contiguous districts with report language defining terms in the House bill to limit "gerrymandering." The House and Senate never reached agreement on details for the equal population standard, leading to the final enactment of only the single member district requirement. At the state level, 22 states mandate that their Congressional districts be contiguous—more states than have adopted any other specific requirement (Congressional Research Service Report R42831, November 2012, page 3). Many states, including Maryland have a similar requirement for state legislative districts. Justice O'Connor in *Shaw v Reno* (509 U.S. 630) cited contiguity as a traditional districting principal which may be considered in determining whether improper factors, such as race, have been unduly incorporated.

25. In the development of the current Maryland Congressional districts, the State presumed that technical contiguity was a requirement. Citizens offering prospective redistricting plans were directed to

make the districts technically contiguous. Indeed the enacted districts are technically contiguous, even though they are not de-facto contiguous. In fact, it is likely that many of the enacted districts, such as the 2nd and 3rd, would be far more comprehensible were they to be wholly non-contiguous. For example, the 3rd district contains de-facto non-contiguous segments of relatively Democratic suburban areas of Baltimore Howard, and Montgomery Counties, as well as Annapolis and predominantly affluent sections of Baltimore City. However, the ribbons connecting these pieces include relatively poor sections of Baltimore City as well as some highly Republican sections of Anne Arundel Counties. These ribbons made it much harder for the legislature to develop coherent adjacent districts. If there is an actual or perceived requirement for the districts to be technically contiguous, then it follows that such districts must be de-facto contiguous as well—i.e., not connected through just a narrow ribbon or orifice, as such ribbon or orifice makes no difference or improvement upon the level of representation or any other characteristic of such districts, and in fact serve to make representation of the resulting districts more problematic—for voters and their Representatives.

26. Geographic factors, such as contiguity, are important elements of representation. Representatives can adequately represent us and our neighbors—even if we have differences of opinion that would influence our votes (i.e., where there are demographic and/or political differences within a contiguous district). Representation is more uncertain and difficult if a single representative represents two or more distinct areas but not the residents who live in between,

particularly if the two separate areas are not compatible. Contiguity has been cited as a factor that can be "an easily applied factor by the courts" (Congressional Research Service Report R42831, November 2012, page 11)—and we suggest that "de-facto" contiguity can be reasonably applied as well.

27. While geographic factors are important to effective representation, they do not guarantee it or "fairness"—or the lack of gerrymandering. Justice Scalia noted this in *Vieth*. We do not purport that our primary requested relief will eliminate partisan gerrymandering. Indeed, the districts revised by resolving the non-contiguous small sections of the 4th, 6th, 7th, and 8th districts can still maintain the state's intent to create 7 predominantly Democratic districts and 1 predominantly Republican district. In the maps we provide for examples of request relief, all of the districts—except the packed 1st—had at least a 54% Democratic vote in the 2008 Presidential election. This may be less lopsided than the status quo, but certainly still gerrymandered as intended by the legislature.

28. While our requested relief will not eliminate gerrymandering, it will eliminate a particularly egregious tool—with respect to representational and voting rights--that has been increasingly used in Maryland to accomplish gerrymandering. Justice O'Connor noted in *Bandemer* that "there is good reason to think that political gerrymandering is a self-limiting exercise." States are using increasingly egregious tools to stretch such limits. Maryland incorporated one similar district (the 4th) in 1990, and now there are three—as well as several other districts with exotic features unintended to optimize representation. In

discussions with several legislators over the wisdom and fairness of these districts, they voiced a need to make seven of the state's eight districts as solidly Democratic as possible in light of similar efforts by Republican legislators in Texas, Pennsylvania, and other states. Some legislators wished that a fairer level playing field would be imposed by the Courts or by Congress—but that in the absence of such level playing field, Maryland's reluctance to use any and all such gerrymandering tools would be "unilateral disarmament." One legislator voiced support for reforming Maryland's districting process if an agreement to do so could be reached with a similarly-sized predominantly Republican state.

29. Geographic factors are not the only factors of effective representation. Representation, almost by definition, is linked to communities of interest. As noted above, such communities can be geographic. Communities can also represent shared interests--demographic, ethnic, racial, socioeconomic, and political. Many of these shared interests are typically intertwined. Many of Maryland's areas that are urban and low-income vote heavily Democratic, while many rural areas vote heavily Republican. Voters in these different areas may be expected to have different areas of legislative focus and interest. Rural voters may have business interests in and concerns with agricultural policy while urban voters will focus on other economic policies. Justice Kennedy in *Miller v Johnson* (515 U.S. 900) cited the linkage of "communities of actual shared interests" as a factor to be considered in determining whether improper factors, such as race, have been unduly incorporated—similar to Justice O'Connor in *Shaw v Reno* as noted above. While we recognize that

communities of interest are not entitled to representation, we do contend that commonality of interest, reflected through demographics and voting history, is an important factor of representation—and is particularly critical when contiguity is absent.

30. The abridged sections of the 7th and 8th districts are adjacent to the 1st district—which stretches from Carroll County to the lower Eastern Shore. The abridged section of the 4th district is across the Chesapeake Bay Bridge from the 1st district (which it was historically within), separated by a thin ribbon of the 3rd district. The 1st district is essentially "packed" with outer suburban, rural, and Republican voters of the State. Attaching the abridged sections of the 4th, 7th and 8th districts to the 1st would afford them far better representation with respect to geography and demography than their current districts. However, such attachment would overpopulate the 1st district and clearly violate *Wesberry*. Since that "better" arrangement would violate *Wesberry*, the current arrangement--which affords voters in those sections far worse representation--should be considered even less permissible.

31. Through extension of the discussion in paragraph 30 above, since the votes of citizens within the abridged sections are largely marginalized, the Representatives from the 4th, 6th, 7th, and 8th districts will essentially be elected by the voters of the dominant sections. The effective sizes of these districts could be considered comparable to the sizes of their dominant sections. This constitutes an effective violation of *Wesberry*.

32. The Supreme Court held in *Rosario v. Rockefeller* (410 U.S. 752) that states may adopt and regulate closed primaries as a means of protecting the two-party system, though such regulation must not unduly abridge the voting rights of individual voters. Balancing the authority to establish districts within a closed primary system with the responsibility to avoid undue resulting abridgements is consistent with *Rosario*. This is consistent with holding that state authority to regulate the manner of elections must not unduly infringe upon the representational, voting, or political association rights of voters. It is a significant burden of the 1st and 2nd clauses of the 14th Amendment that Maryland has set up both its election processes and these districts such that they, in concert, unduly operate to prevent most voters in the abridged sections of the 4th, 6th, 7th, and 8th districts from voting in the determinative (primary) election for their Representative. The balancing of relevant Constitutional rights and responsibilities requires the State to avoid the convergence of factors it controls that lead to this result.

33. Finally, our proposed standard for the adequacy of representational and voting rights within individual Congressional districts represents a very modest intrusion on the prerogatives of state legislatures. It would give them a clear example of what is not permissible—while still affording them very broad latitude and discretion in developing districts that address their various competing interests—political and otherwise—as afforded by Article 1 Section 4 of the Constitution. It would provide voters greater protection of their representational and voting rights—as afforded by Article 1 Section 2 of the Constitution—without

burdening courts to judge degrees of gerrymandering or leading to outcomes such as proportional representation.

Requested Relief

34. We respectfully request that the Court order relief to include enjoining the Maryland Board of Elections from holding the 2014 elections for Representatives to Congress using the current Congressional districts delineated in Sections 8-702 through 8-709 of the Maryland Election Law Article, and by revising the boundaries of such districts to be used for the 2014-2020 elections to resolve the claimed abridgement. Exhibits 9 through 12 are examples of prospective maps that resolve the claimed abridgement, while maintaining the legislature's intent—based on the current map as well as the reasoning for the current map provided by the Governor's Redistricting Advisory Committee (GRAC)--to the extent practicable. Due to the limitations of the redistricting program we had available to develop these prospective maps, they do not incorporate the adjusted populations from moving Maryland prisoners to the precincts of their homes of record, as required by state law (affirmed by the Supreme Court in *Fletcher*). With the assistance of the Maryland Department of Planning or the Department of Legislative Services, the Court (or a magistrate or master supporting the Court) could easily incorporate such adjustments.

35. We suggest that maps A and B (Exhibits 11 & 12) are preferable, as they maintain Carroll Co. within one district, while incorporating other intentions of the legislature. Map A (Exh. 11) avoids bridging the Montgomery-Prince George's border (cited by the

GRAC) and places coastal northeast Anne Arundel and Annapolis within the same district, consistent with the current map—albeit with the 2nd rather than the 3rd Map B (Exh. 12 has the 5th district cross the Montgomery-Prince George's border, which affords extending the 3rd to Annapolis as it does now (but which was not cited as a priority by the GRAC). Map C (Exh, 13) is similar to Map B, but places western Carroll Co. with the 8th, splitting that county, but more consistent with the current map. Map C1 (Exh. 14) similarly splits Carroll Co, but avoids crossing the Montgomery-Prince George's line and places Fort Meade in the 2nd (both cited by the GRAC as objectives), though this precludes extending the 3rd to Annapolis--which is placed in the 5th. Alternately, Fort Meade could be placed in the 5th, and Annapolis in the 2nd All of these options widen the current orifices splitting the 6th and 8th districts, move the northern Baltimore Co. section of the 7th into the adjacent 1st, and extend the 4th south into Charles Co. This maintains a 5th district that is very similar to the current 5th without the current repugnant 4th district ribbon to Anne Arundel Co. All of these prospective options avoid the abridgement present within the current 4th 6th, 7th, and 8th districts, while maintaining the overwhelming intent of the legislature with respect to all districts' political and geographic content.

36. For purposes of comparison, Options D & E (Exhibits 15 & 16) portray examples of such maps that would rectify a finding of state-wide partisan gerrymandering. Using the current map as a starting point, Option D (Exh. 15) contains one firmly Republican District (2nd), one leaning Republican District (1st), one leaning Democratic District (5th) and

five firmly Democratic Districts (similar to the pre-2010 Census map). Option E (Exh. 16) makes both the 1st and 2nd firmly Republican. Our point in presenting these options is to show that the earlier options A through C1 more manageably rectify the demonstrated abridgment of representational rights than Options D & E rectify state-wide partisan gerrymandering. The former overwhelmingly maintain the legislature's intents and similarly avoid the more amorphous partisan composition judgments that Courts, such as in *Vieth* and *Fletcher*, have been reluctant to undertake.

Respectfully submitted,

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APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No.: JKB-13-CV-3233

[Filed December 2, 2013]

O. JOHN BENISEK)
)
et . al.)
)
v.)
)
BOBBIE S. MACK, Chairman,)
Maryland State Board of Elections)
)
et. al.)
)
In their official capacities)
)

* * * * * * * * *

AMENDED COMPLAINT

[***Table of Contents omitted
for purposes of this Appendix***]

Jurisdiction

1. Jurisdiction is based on a Federal question (provisions of the United States Constitution).

Overview of claim

2. Understanding that this Court has previously found the Congressional Districts established by the General Assembly of Maryland, specifically Sections 8-702 through 8-709 of the Election Law Article, not to be a "partisan gerrymander" (*Fletcher v. Lamone*) in violation of the 14th Amendment, we contend that the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts impermissibly abridge our rights, and those of similarly situated Marylanders, of representation as protected by Article 1 Section 2 of the U.S. Constitution; our right to vote for our Representatives to Congress, as protected by both the first and second clauses to the 14th Amendment to the U.S. Constitution; and our First Amendment rights of political association. Our claim is distinct from the partisan gerrymandering claim decided in *Fletcher* in that we are challenging the narrow ribbons and orifices used to tie de-facto non-contiguous and demographically inconsistent segments into individual districts—and not the overall partisan make-up of the state's Congressional districts. This is a critical and significant distinction—which does not rely on the reason or intent of the legislature—partisan or otherwise--in its incorporation of these features; this distinction impacts both the standard we offer for determining the adequacy of representational rights as well as the requested relief to restore such abridged rights. Such relief includes elimination of the orifices and ribbons but, except for the supplemental relief requested in paragraph 36, does not include options that would change the overall (7 Democratic – 1 Republican) partisan make-up of the enacted districts.

Therefore the focus of our claim is not so much that the State incorporated too much focus on impermissible partisan gerrymandering—but rather that the State incorporated too little focus on affording adequate representation to voters in the abridged sections of the 4th, 6th, 7th and 8th districts. We take this action now to obtain relief—prior to 2022—for the over 700,000 Marylanders who live in the parts of these districts where their representational rights are infringed, and to ensure that future maps afford greater regard for representational rights.

3. We contend that the presence of either (1) geographic or (2) demographic/political commonality—i.e., real or de-facto contiguity OR similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments—is a manageable standard for judging whether minimal representational rights are afforded or abridged within the smaller segments of the 4th, 6th, 7th, and 8th districts. The representation afforded within such districts is infringed for residents of both the dominant (larger) and smaller sections, though it is most pernicious for residents of the smaller sections. This standard reflects the impermissible abridgement of the representational rights of voters within these smaller sections as a logical extension of *Wesberry v. Sanders (376 U.S. 1)*, notwithstanding the broad authority of the State of Maryland to determine the boundaries of such districts under Article 1 Section 4 of the U.S. Constitution and to regulate elections. As we demonstrate in paragraphs 14 & 15, federal courts are already making similar judgments as extensions of *Wesberry*.

4. We recognize that under current case law, States have very broad discretion under the Constitution to fashion Congressional districts as they see fit to bring about the political and other objectives desired by the legislature. However, as established by *Wesberry*, voters also have representational rights under the Constitution—and we contend that States must afford a modicum of respect to those representational rights, including but not limited to equal population, regardless of the other factors or objectives the State opts to take into account when exercising its authority and responsibility to establish Congressional districts.

5. In addition to infringement of representational and voting rights, we also claim that the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in the 2008 Presidential election. The abridgement of representational, voting, and association rights is exacerbated by the significant differences in size between the discrete segments of each district, and Maryland's closed primary system for electing Representatives to Congress.

6. We respectfully request that the Court convene a 3-member District Court to further consider our claims under 28 U.S.C. 2284 and to grant relief to include enjoining the defendants from holding the 2014 elections for Representatives to Congress using the current districts in Sections 8-702 through 8-709 of the Election Law Article, and by revising the boundaries of such districts to be used for the 2014-2020 elections in a manner that resolves the abridgement. We have attached examples of prospective maps that resolve the

abridgement, and (1) maintain the legislature's intent to the fullest extent practicable; or (2) that reduce deference to the legislature's intent as justified in paragraph 36.

Relevant Facts:

7. The 2010 Census allocated Maryland eight Representatives in Congress, the same number as in recent decades.

8. In October 2011, the Maryland General Assembly enacted Senate Bill 1, creating the state's current Congressional districts (shown in Exhibit 1), codified in Sections 8-702 through 8-709 of the Election Law Article, during a special session called by the Governor to consider new Congressional districts that he proposed following the 2010 Census. The Governors' proposal closely followed the districts recommended by the Governor's Redistricting Advisory Committee (GRAC). The GRAC, which included the Senate President and House Speaker, provided explanations for its recommendations in Exhibit 2. Senate Bill 1 was subsequently petitioned to referendum by voters opposed to the Bill, as provided by the Maryland Constitution. After being petitioned to referendum, it was ratified by the voters in the November 2012 General Election. However, litigation challenging the ratification over the clarity of the ballot language drafted by the Maryland Secretary of State is pending before the Maryland Court of Special Appeals (*Parrott v. McDonough*).

9. Maryland's Congressional districts were reviewed by this Court in December 2011 in *Fletcher v Lamone*, in which those plaintiffs claimed violations of the

Voting Rights Act as well as that the new districts constituted a state-wide partisan gerrymander under *Davis v Bandemer*. This Court found no violation of the Voting Rights Act and denied the state-wide partisan gerrymander claim pursuant to *Vieth v Jubelirer*.

10. Several of the newly enacted districts contain de-facto non-contiguous segments—i.e., discrete segments that would be wholly non-contiguous but for the placement of one or more narrow orifices or ribbons connecting the discrete segments; such districts are essentially identical to those that would exist without such orifices or ribbons.

11. The 4th, 6th, 7th, and 8th districts each consist of two distinct segments—one segment of which being far more populous than the other as well as being socioeconomically, demographically, and politically inconsistent with the other segment. In each of these districts, the larger and smaller sections are technically connected through a narrow ribbon or orifice. Thus they are essentially or de-facto non-contiguous.

12. Exhibits 3-10 are maps of the dominant and smaller sections of these districts, which are described below.

(a) (1) Exhibits 3&4 show the dominant and smaller sections of the 4th Congressional District. This district is a majority African-American district that was first developed in 1990 to account for the increasing population of African-American residents within Prince George's County. The dominant portion of the 4th district is centered in the portion of Prince George's County within the Capital Beltway and bordering the District of Columbia. This portion of the district

contains 450,000 residents who are predominantly (74%) African-American (and 16% Hispanic and 6% white), urban, lower-middle income, and overwhelmingly Democratic voters. President Obama received 96% of the vote within this portion in 2008. This segment is attached through a narrow ribbon to the smaller segment of 185,000 residents in northeastern Anne Arundel County who are predominantly outer-suburban, 84% white (and 7% black and 4% Hispanic), middle income, and predominantly Republican voters. President Obama received 42% of the vote within this portion in 2008. These Anne Arundel residents share little in common with their Prince George's counterparts that is relevant to effective or meaningful representation.

(2) Given the composition of this district, its Representative will be elected by the voters of the Prince George's segment, and will almost certainly be a Democrat. Indeed, if the very different voters of the Anne Arundel segment could have any significant impact on the outcome, then the district would almost certainly be in violation of the Voting Rights Act due to dilution of African-American voters—and this Court found no such violation in *Fletcher v Lamone*. As practical matter, the election of the district's Representative will be determined by the Democratic primary election.

(b) Exhibits 5&6 show the dominant and smaller sections of the 6th Congressional District. The population of this district is centered in Montgomery County, Maryland's largest county. Its population is overwhelmingly suburban and Democratic. Its residents live and work primarily in the Washington,

D.C. metropolitan area. The dominant Montgomery and southern Frederick County segment of the district contains 470,000 residents. This portion is 52% white, 15% African-American, and 15% Hispanic. President Obama received 66% of the vote of this segment in 2008. This segment is connected to Maryland's three westernmost counties, containing 250,000 residents, through a narrow orifice at the southern end of the Washington-Frederick county line. These three counties are predominantly rural, with significant industries including agriculture, railroads, energy, and mining in the far west. Economically the region is relatively depressed, as manufacturing activity has decreased in recent years. Politically it is predominantly Republican; minorities are few in number. This abridged segment is 86% white, 8% African American, and 3% Hispanic. President Obama received 39% of this segment's vote in 2008. Plaintiff John BENISEK is a Republican resident of this segment.

(c) Exhibits 7&8 show the pieces of the 7th District. This district is centered within Baltimore City—in wards containing 400,000 residents who are almost exclusively African-American, urban, lower-middle income, and Democratic. The district extends in a contiguous fashion to the southwest, picking up 200,000 residents from adjacent similar areas of Baltimore County and from contiguous but less demographically similar sections of Howard County—which includes a mixture of white, African-American, middle and upper income, Democratic and Republican, and suburban and rural voters. Overall, this dominant contiguous section contains 600,000 residents who are 59% African-American, 29% white,

3% Hispanic. President Obama received 80% of this segment's vote in 2008. Attached to this district through a narrow ribbon is a wholly inconsistent and de-facto non-contiguous abridged segment of 45,000 voters in northern Baltimore County. This area is overwhelmingly (89%) white (and 2% African-American and 2% Hispanic), rural and suburban, middle-upper income, and predominantly Republican—comprising some of the most heavily Republican precincts in the entire state. President Obama received 37% of this segment's vote in 2008. Maria PYCHA is a Republican resident of this segment. Overall the 7th District is an African-American majority district as required by the Voting Rights Act. Like the 4th District, its Representative will be a Democrat who will be elected in the Primary; the General Election will be of no consequence in the 7th

(d) Exhibits 9&10 show the 8th District. This district contains 470,000 voters in southern Montgomery County—which is multi-ethnic, suburban, largely but not entirely affluent, and overwhelmingly Democratic. This dominant segment is 53% white, 15% African-American, and 18% Hispanic. President Obama received 76% of this segment's vote in 2008. Stephen SHAPIRO is a Democratic resident of this segment. This segment connects, through a narrow orifice, to 230,000 de-facto non-contiguous residents of northern Frederick Co. and Carroll Co. This northern segment is 89% white, 4% African-American, and 4% Hispanic. President Obama won 39% of this segment's vote in 2008. The 8th District's Representative will also be a Democrat who will be elected in the Primary; the General Election will be a technicality.

Review and Application of Relevant Case Law:

13. Early in the prior century, Congress determined that, as a matter of policy pursuant to its authority under Article 1 Section 4 of the U.S. Constitution, Congressional districts should be compact, contiguous, and of equal population (Reapportionment Act of August 8, 1911). The U.S. Supreme Court determined in 1932 that those policy requirements only applied to districts created pursuant to the 1910 Census and were no longer in effect (*Wood v Broom, 287 U.S. 1*). However, three decades later, the Supreme Court determined in *Wesberry v Sanders* (376 U.S. 1) that districts must have equal population as a representational right under Article 1 Section 2 of the U.S. Constitution. The Supreme Court also held in *Wesberry* that claims regarding Congressional redistricting are justiciable, that voters within a State have standing to make such claims, that legislatures may not "draw lines in such a way as to give some voters a greater voice in choosing a Congressman than others," that the right to vote is embodied within Article 1 Section 2 of the U.S. Constitution, and that the right to vote extends beyond just casting a ballot, but to have that ballot count equally. It is noteworthy that the dissenters in *Wesberry* raised objections similar to the plurality in *Vieth* regarding manageability. However, courts have subsequently managed *Wesberry* cases, making essentially similar judgments to what we propose now.

14. Federal courts have already exercised similar case-by-case judgment in ruling on redistricting cases regarding equal population—i.e., deciding whether Congressional districts that are not of precisely equal

size do or do not afford adequate representation. Under *Wesberry*, states have typically been held to a very tight standard for Congressional districts, with almost no variations in size permitted. In *Karcher v Daggett* (462 U.S. 725), the U.S. Supreme Court found New Jersey did not have adequate justification for a redistricting map with less than 0.7% difference in population among districts. However, in *Tennant v Jefferson County*. (567 U.S.), the Supreme Court decided that West Virginia did have an acceptable basis for a 0.79% difference in population among districts—i.e., to avoid splitting counties. The *Karcher* and *Tennant* judgments are essentially the same judgments we are asking this Court to make in this current instance. The small (0.7% & 0.79%) variances in population within those cases were representationally insignificant. The districts in those cases were essentially approved or disapproved by the Court based on other aspects affecting the adequacy of representation afforded by those districts. Given those cases, it is almost inconceivable that the current Maryland maps would have survived earlier judicial scrutiny if our new districts had anything approaching a mere 0.7% population variance. The paucity of representation afforded within the abridged sections of Maryland's 4th, 6th, 7th, and 8th districts should not be immunized by this Court only because there is no population variance among the overall districts.

15. Federal courts have made similar judgments regarding state legislative redistricting pursuant to *Baker v. Carr* (39 U.S. 186) and *Reynolds v. Simms* (377 U.S. 533). In *Gaffney v Cummings*, the U.S. Supreme Court noted that state legislative districts are held to a less strict standard than for Congressional

districts, and upheld state house districts with a 7.8% variance. Variances within 10% had been generally viewed as within a state's prerogative for legislative districts—i.e., a "safe harbor." However, in *Cox v Larios* (542 U.S.) the Supreme Court clarified that there is no absolute safe harbor, even for legislative districts, and ruled that a Georgia map with variances less than 5% was impermissible as the variations were made for unacceptably partisan purposes, rather than to better afford representation—such as by not dividing jurisdictions. Implementation of the standard we suggest on a district-by-district basis is similarly manageable as the equal population cases noted above and in paragraph 14.

16. The second clause of the 14th Amendment to the U.S. Constitution reduces a state's apportionment where the right to vote for Representatives "is in any way abridged." This clause, in combination with the Equal Protection Clause as well as Article 1, serves as an outright prohibition against abridging the right to vote in any way—as the Equal Protection Clause and Article 1, under *Wesberry*, would not permit a state to take an action which would reduce its apportionment and the voice of its voters.

17. Under *Wesberry*, the Supreme Court held that voters have representational rights under Article 1 that States must respect when determining Congressional districts. The Supreme Court held in *Baker v Carr* (369 U.S. 186) that that voters hold similar voting rights under the 14th Amendment that States must respect when determining Congressional and legislative districts. If, per *Wesberry* and *Baker*, districts established by the State must afford its residents a

modicum of representational and voting rights, then it is a logical extension to conclude that such constitutionally adequate representation must consist of more than just equal population. If residents do not share either real geographic contiguity or some degree of demographic or political commonality, then they enjoy no more representational or voting rights than if their districts were of significantly unequal size; in fact, the voters within the abridged sections of these districts enjoy less adequate representation than if they were combined into adjacent but oversized districts.

18. In *Vieth*, a plurality of the U.S. Supreme Court held that partisan gerrymandering claims are not justiciable due to the lack of judicially discoverable and manageable standards as to what constitutes state-wide partisan gerrymandering. *Bandemer* and *Vieth* (and *Fletcher*) addressed allegations of discrimination against voters of a political party as a class. The plurality in *Vieth* and the minority in *Bandemer*—who raised concerns similar to the *Vieth* plurality—felt the Judiciary is not equipped to make judgments as to whether a state-wide districting map unconstitutionally burdens members of a political party. Our claim requires no such judgment. The standard we propose to effectively strike the use of narrow ribbons and orifices to link inconsistent segments is more relevant and manageable than determining how much partisanship is too much for a state-wide configuration.

19. Justice O'Connor, concurring in the Court's judgment in *Bandemer*, contrasted that case's assertion of group rights to an equal share of power and political

representation with other cases protecting the rights of individuals to vote. She quoted from *Reynolds v Simms* (377 U.S. 533) "To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." The construction of these 4th, 6th, 7th, and 8th districts dilutes—and largely marginalizes—the votes of residents within their abridged sections. A potentially decisive vote is worth more than a vote that is, through its design, negligible.

20. While the *Vieth* plurality held that prospective standards for determining unacceptable state-wide partisan gerrymandering were not sufficiently manageable, Justice Scalia noted in *Vieth* that "courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear." The courts have already exercised such case-by-case judgment in ruling on redistricting cases regarding equal population—i.e., deciding when states may or may not implement districts not of equal size—as noted in paragraphs 14 & 15. The standard we suggest in paragraph 3 is at least as manageable for similarly protecting representational rights.

21. In *LULAC v Perry* (548 U.S.), Justice Kennedy wrote that "judicial respect for legislative plans (for Congressional redistricting), however, cannot justify legislative reliance on improper criteria for districting determinations." He also held the standard for statewide gerrymandering offered by the plaintiffs in *LULAC* (mid-decade redistricting with partisan

intentions) to be insufficiently reliable, as it would produce different results for a regular decennial redistricting. However, the standard we propose for this case—a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity—is far more reliable for reviewing individual districts than the statewide standard that was dismissed in *LULAC*. Our proposed standard would not yield variable results, as the Court found to be the case with the proposed state-wide *LULAC* standard. Justice Kennedy also wrote in *LULAC* that "Quite apart from the risk of acting without a legislature's expertise, and quite apart from the difficulties a court faces in drawing a map that is fair and rational, the obligation placed upon the Federal Judiciary is unwelcome because drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." This suggests that States, in exercising their responsibility for redistricting under Article 1 Section 4, have a responsible to do so in a manner consistent with affording its citizens their representational rights under Article 1 Section 2. It also suggests that while State legislatures certainly have the expertise to create districts that are wise, fair, rational, and ensure citizen participation—as well as the responsibility to enact districts that comport with the U.S. Constitution--it is a stretch to presume that a State has in fact done either, particularly when the district-by-district test we suggest for representational rights is clearly not met. While we do not contend that the Constitution requires the state to enact districts that afford the most ideal representation for its citizens, we do contend that the Constitution requires more than the least ideal--and

that the state must incorporate a high priority to affording representation when balancing other competing objectives it may have in configuring Congressional districts.

22. We contend that the design and demographics of the 4th, 6th, 7th, and 8th districts—i.e., lack of contiguity whereas the discrete small section of each of these districts is geographically AND demographically discordant with the larger segment, represents a particular abridgement of the representational rights of voters in such smaller sections under Article 1, analogous to *Wesberry*, as well as their voting rights under Clauses 1 and 2 of the 14th Amendment. The "AND" as used above is significant to our contention. Justice Scalia, writing for the Supreme Court plurality in *Vieth*, held that non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights. Our contention is that such non-contiguity, when combined with disparity in demographics affords such paucity of representation that it does constitute an impermissible abridgement of such rights within the smaller segments. Both defects together afford a lesser degree of representation and, therefore, constitute a greater degree of abridgement than either alone. Voters in the smaller sections share with those of the dominant sections neither the proximity of neighbors nor the similarity of political views and the demographic factors that shape them. Odds are remote that representatives selected by voters of the dominant sections can ably, effectively, or empathetically represent voters in the smaller abridged sections. Citizens of both segments are impacted as their Representative attempts to effectively represent both.

Representational rights are more than just casting a marginalized vote. While the Supreme Court has been reluctant to accept a "totality of the circumstances" standard for state-wide partisan gerrymandering, our proposed standard affords a manageably straightforward and decisive district-by-district assessment of representational adequacy.

23. We also contend that since the abridgement most particularly impacts only areas with highly Republican voting history—all four smaller segments, it also constitutes violation of the First Amendment's protection of political association—along the lines suggested by Justice Kennedy in his concurrence in *Vieth*. In paragraph 36, we cite this contention to further justify diminished reliance on the legislature's intent in determining the appropriate level of relief; the higher level of representation afforded to residents of the smaller segments achieved through incorporation of the supplemental requested relief warrants that relief's degree of departure from the legislature's map.

24. (a) Even though the Supreme Court has not held geographic contiguity alone to be a litmus test for representational rights, there is a long history of contiguity being considered important or required by Congress or state legislatures on policy grounds—similar to the history of requirements for equal population.

(b) Our point in providing this historical review is not to establish that there is a current Constitutional or statutory mandate for contiguous districts, but rather to establish that contiguity has long been considered a traditional districting principal for affording representation--and is therefore one proper element for

a multi-element standard, such as we have offered, to support determinations of whether requisite representation has been afforded under Article 1 Section 2 of the U.S. Constitution.

(c) Contiguity was the first redistricting standard imposed by Congress, which first required districts be contiguous in 1842 (5 Stat 491). That law also required districts to be single-member. Equal population, in addition to contiguity, was mandated in 1872 (17 Stat 492), the same year that Congress codified the 2nd clause of the 14th Amendment (17 Stat 29). Compactness was added as a later requirement in 1901 (26 Stat 736). These three standards were continued in the Apportionment Act of August 8, 1911 (37 Stat 13). Congress did not mandate any of these standards further until after *Wesberry*, when Congress restored the single member district requirement in 1967 to prevent at-large voting for Representatives (81 Stat 581). When the House of Representatives passed districting legislation in 1967, the Judiciary Committee issued House Report 90-191, augmenting requirements for equal size, compact, and contiguous districts with report language defining terms in the House bill to limit "gerrymandering." The House and Senate never reached agreement on details for the equal population standard, leading to the final enactment of only the single member district requirement. At the state level, 22 states mandate that their Congressional districts be contiguous—more states than have adopted any other specific requirement (Congressional Research Service Report R42831, November 2012, page 3). Many states, including Maryland have a similar requirement for state legislative districts. Justice O'Connor in *Shaw v Reno* (509 U.S. 630) cited contiguity as a traditional

districting principal which may be considered in determining whether improper factors, such as race, have been unduly incorporated.

25. In the development of the current Maryland Congressional districts, the State presumed that technical contiguity was a requirement. Citizens offering prospective redistricting plans were directed to make the districts technically contiguous. Indeed the enacted districts are technically contiguous, even though they are not de-facto contiguous. In fact, it is likely that many of the enacted districts, such as the 2nd and 3rd, would be far more comprehensible were they to be wholly non-contiguous. For example, the 3rd district contains de-facto non-contiguous segments of relatively Democratic suburban areas of Baltimore, Howard, and Montgomery Counties, as well as Annapolis and predominantly affluent sections of Baltimore City. However, the ribbons connecting these pieces include relatively poor sections of Baltimore City as well as some highly Republican sections of Anne Arundel Counties. These ribbons made it much harder for the legislature to develop coherent adjacent districts. If there is an actual or perceived requirement for the districts to be technically contiguous, then it follows that such districts must be de-facto contiguous as well—i.e., not connected through just a narrow ribbon or orifice, as such ribbons or orifices makes no difference or improvement upon the level of representation or any other characteristic of such districts, and in fact serve to make representation of the resulting districts more problematic—for voters and their Representatives.

26. Geographic factors, such as contiguity, are important elements of representation. Representatives can adequately represent us and our neighbors—even if we have differences of opinion that would influence our votes (i.e., where there are demographic and/or political differences within a contiguous district). Representation is more uncertain and difficult if a single representative represents two or more distinct areas but not the residents who live in between, particularly if the two separate areas are not compatible. Contiguity has been cited as a factor that can be "an easily applied factor by the courts" (Congressional Research Service Report R42831, November 2012, page 11)—and we suggest that "de-facto" contiguity can be reasonably applied as well.

27. While geographic factors are important to effective representation, they do not guarantee it or "fairness"—or the lack of gerrymandering. Justice Scalia noted this in *Vieth*. We do not purport that our primary requested relief will yield districts that are fair or that eliminate partisan gerrymandering—though they will be an improvement in both regards. Indeed, the districts revised by resolving the non-contiguous small sections of the 4th, 6th, 7th, and 8th districts can still maintain the state's intent and effect to create 7 predominantly Democratic districts and 1 predominantly Republican district. In the maps we provide for examples of request relief, all of the districts—except the packed 1st—had at least a 54% Democratic vote in the 2008 Presidential election. This may be less lopsided than some current districts, but certainly still gerrymandered as intended by the legislature.

28. While our requested relief will not eliminate gerrymandering, it will eliminate a particularly egregious tool—with respect to representational and voting rights--that has been increasingly used in Maryland to accomplish gerrymandering. Justice O'Connor noted in *Bandemer* that "there is good reason to think that political gerrymandering is a self-limiting exercise." States are using increasingly egregious tools to stretch such limits. Maryland incorporated one similar district (the 4th) in 1990, and now there are three—as well as several other districts with exotic features unintended to optimize representation. In discussions with several legislators over the wisdom and fairness of these districts, they voiced a need to make seven of the state's eight districts as solidly Democratic as possible in light of similar efforts by Republican legislators in Texas, Pennsylvania, and other states. Some legislators wished that a fairer level playing field—i.e., at least minimal standards--would be recognized by the Courts or imposed by Congress—but that in the absence of such level playing field, Maryland's reluctance to use any and all such gerrymandering tools would be "unilateral disarmament." One legislator voiced support for reforming Maryland's districting process if an agreement to do so could be reached with a similarly-sized predominantly Republican state.

29. Geographic factors are not the only factors of effective representation. Representation, almost by definition, is linked to communities of interest. As noted above, such communities can be geographic. Communities can also represent shared interests--demographic, ethnic, racial, socioeconomic, and political. Many of these shared interests are typically

intertwined. Many of Maryland's areas that are urban and low-income vote heavily Democratic, while many rural areas vote heavily Republican. Voters in these different areas may be expected to have different areas of legislative focus and interest. Rural voters may have business interests in and concerns with agricultural policy while urban voters will focus on other economic policies. Justice Kennedy in *Miller v Johnson* (515 U.S. 900) cited the linkage of "communities of actual shared interests" as a factor to be considered in determining whether improper factors, such as race, have been unduly incorporated—similar to Justice O'Connor in *Shaw v Reno* as noted above. While we recognize that communities of interest are not entitled to representation, we do contend that commonality of interest, reflected through demographics and voting history, is an important factor of representation—i.e., a suitable element for a multi-element standard to assess representational adequacy--and is particularly critical when contiguity is absent.

30. The abridged sections of the 7th and 8th districts are adjacent to the 1st district—which stretches from Carroll County to the lower Eastern Shore. The abridged section of the 4th district is across the Chesapeake Bay Bridge from the 1st district (which it used to be within), separated by a thin ribbon of the 3rd district. The 1st district is essentially "packed" with outer suburban, rural, and Republican voters of the State. Attaching the abridged sections of the 4th, 7th and 8th districts to the 1st would afford them far better representation with respect to geography and demography than their current districts. However, such attachment would overpopulate the 1st district and clearly violate *Wesberry*. Since that "better"

arrangement would violate *Wesberry*, the current arrangement--which affords voters in those sections far worse representation--should be considered even less permissible.

31. Through extension of the discussion in paragraph 30 above, since the votes of citizens within the abridged sections are largely marginalized, the Representatives from the 4th, 6th, 7th, and 8th districts will essentially be elected by the voters of the dominant sections in the primary. The effective sizes of these districts could therefore be considered comparable to the sizes of their dominant sections--constituting an effective violation of *Wesberry*.

32. The Supreme Court held in *Rosario v. Rockefeller* (410 U.S. 752) that states may adopt and regulate closed primaries as a means of protecting the two-party system, though such regulation must not unduly abridge the voting rights of individual voters. Balancing the authority to establish districts within a closed primary system with the responsibility to avoid undue resulting abridgements of representation and voting rights is consistent with *Rosario*. This is consistent with holding that state authority to regulate the manner of elections must not unduly infringe upon the representational, voting, or political association rights of voters. It is a significant burden of the 1st and 2nd clauses of the 14th Amendment that Maryland has set up both its election processes and these districts such that they, in concert, unduly operate to prevent most voters in the abridged sections of the 4th, 6th, 7th, and 8th districts from voting in the determinative (primary) election for their Representative. The balancing of relevant Constitutional rights and

responsibilities requires the State to avoid the convergence of factors it controls that lead to this result.

33. Finally, our proposed standard for the adequacy of representational and voting rights within individual Congressional districts represents a very modest intrusion on the prerogatives of state legislatures. It would give them a clear example of what is not permissible—while still affording them very broad latitude and discretion in developing districts that address their various competing interests—political and otherwise—as afforded by Article 1 Section 4 of the Constitution. It would provide voters greater protection of their representational and voting rights—as afforded by Article 1 Section 2 of the Constitution—without burdening courts to judge degrees of gerrymandering or leading to outcomes such as proportional representation.

Requested Relief

34. Primary requested relief. We respectfully request that the Court order relief to include enjoining the Maryland Board of Elections from holding the 2014 elections for Representatives to Congress using the current Congressional districts delineated in Sections 8-702 through 8-709 of the Maryland Election Law Article, and by revising the boundaries of such districts to be used for the 2014-2020 elections to resolve the claimed abridgement. Exhibits 11 through 14 are examples of prospective maps that resolve the claimed abridgement, while maintaining the legislature's intent—based on the current map as well as the reasoning for the current map provided by the Governor's Redistricting Advisory Committee (GRAC,

Exh. 2)--to the extent practicable. Due to the limitations of the redistricting program we had available to develop these prospective maps, they do not incorporate the adjusted populations from moving Maryland prisoners to the precincts of their homes of record, as required by state law (affirmed by the Supreme Court in *Fletcher*). With the assistance of the Maryland Department of Planning or the Department of Legislative Services, the Court (or special master supporting the Court) could easily incorporate such adjustments within an hour.

35. We suggest that maps A and B (Exhibits 11 & 12) are preferable, as they maintain Carroll Co. within one district, while incorporating other intentions of the legislature. Map A (Exh. 11) avoids bridging the Montgomery-Prince George's border (cited by the GRAC) and places coastal northeast Anne Arundel and Annapolis within the same district, consistent with the current map—albeit with the 2nd rather than the 3rd. Map B (Exh. 12 has the 5th district cross the Montgomery-Prince George's border, which affords extending the 3rd to Annapolis as it does now (but which was not cited as a priority by the GRAC). Map C (Exh, 13) is similar to Map B, but places western Carroll Co. with the 8th, splitting that county, but more consistent with the current map. Map C1 (Exh. 14) similarly splits Carroll Co, but avoids crossing the Montgomery-Prince George's line and places Fort Meade in the 2nd (both cited by the GRAC as objectives), though this precludes extending the 3rd to Annapolis--which is placed in the 5th. Alternately, Fort Meade could be placed in the 5th, and Annapolis in the 2nd All of these options widen the current orifices splitting the 6th and 8th districts, move the northern

Baltimore Co. section of the 7th into the adjacent 1st, and extend the 4th south into Charles Co. This maintains a 5th district that is very similar to the current 5th without the current repugnant 4th district ribbon to Anne Arundel Co. All of these prospective options manageably rectify the abridgement present within the current 4th 6th, 7th, and 8th districts, and increase the representation they afford their residents to more permissible levels--while maintaining the overwhelming intent of the legislature with respect to all districts' political and geographic content. They similarly avoiding the partisan composition judgments that Courts, such as in *Vieth* and *Fletcher*, have been reluctant to undertake.

36. Supplemental requested relief. While the relief afforded by Exhibits 11-14 would be most welcome, the degree of that relief—with respect to improved representation--would be somewhat limited due to those options' very significant reliance on the legislature's intent, maintaining—albeit to a less extreme extent—significant linkage between demographically disparate communities, while similar/compatible communities are arbitrarily split up. A justifiably greater degree of representational adequacy can be achieved for the residents of the small sections of the 6th, 8th, and 7th districts by combining them together—along with sufficient adjoining compatible territory to constitute a district. Options D & E (Exhibits 15 & 16) portray examples of such maps, which admittedly incorporate less deference to the legislature's intent. We suggest that such diminished deference is appropriate, in light of the infringements to representation, unless the State can show how its intentions otherwise support or afford better

representation to its citizens. As we have previously noted, the state has an obligation, established through prior case law, to balance representation with other objectives; maps D and E afford a greater and more appropriate level of focus on representation for all of Maryland's residents and particularly for those whose representation is most infringed by the current map. Additionally, since, as we have shown, the current state-wide map (1) particularly infringes the representational and voting rights of residents of the smaller segments of four of Maryland's Congressional districts; and (2) all four such smaller segments—with over 700,000 residents—are predominantly Republican in voting history, the departure from legislative intent with respect to political composition (i.e., going to 6 Democratic and 2 Republican districts) that results from combining the small segments, while not intended (our intent being to afford the improved representation that results from combining these compatible adjacent segments), is nevertheless particularly justifiable and appropriate. Option D (Exh. 15) adds parts of northern Harford and Cecil Co. to the northern segments of the current 6th, 8th, and 7th districts to form a consolidated (new 2nd) district. Option E (Exh. 16) substitutes northwestern Howard Co. in lieu of northern Cecil in the consolidated district. Option D results in a 1st district more cohesively centered on the Chesapeake Bay, whereas Option E results in 1st district that is more solidly Republican than Option D, with more territory from rural northern Maryland.

Respectfully submitted,

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EXHIBIT 1

Maryland 2011 Congressional Districts

Senate Bill 1

October 20, 2011

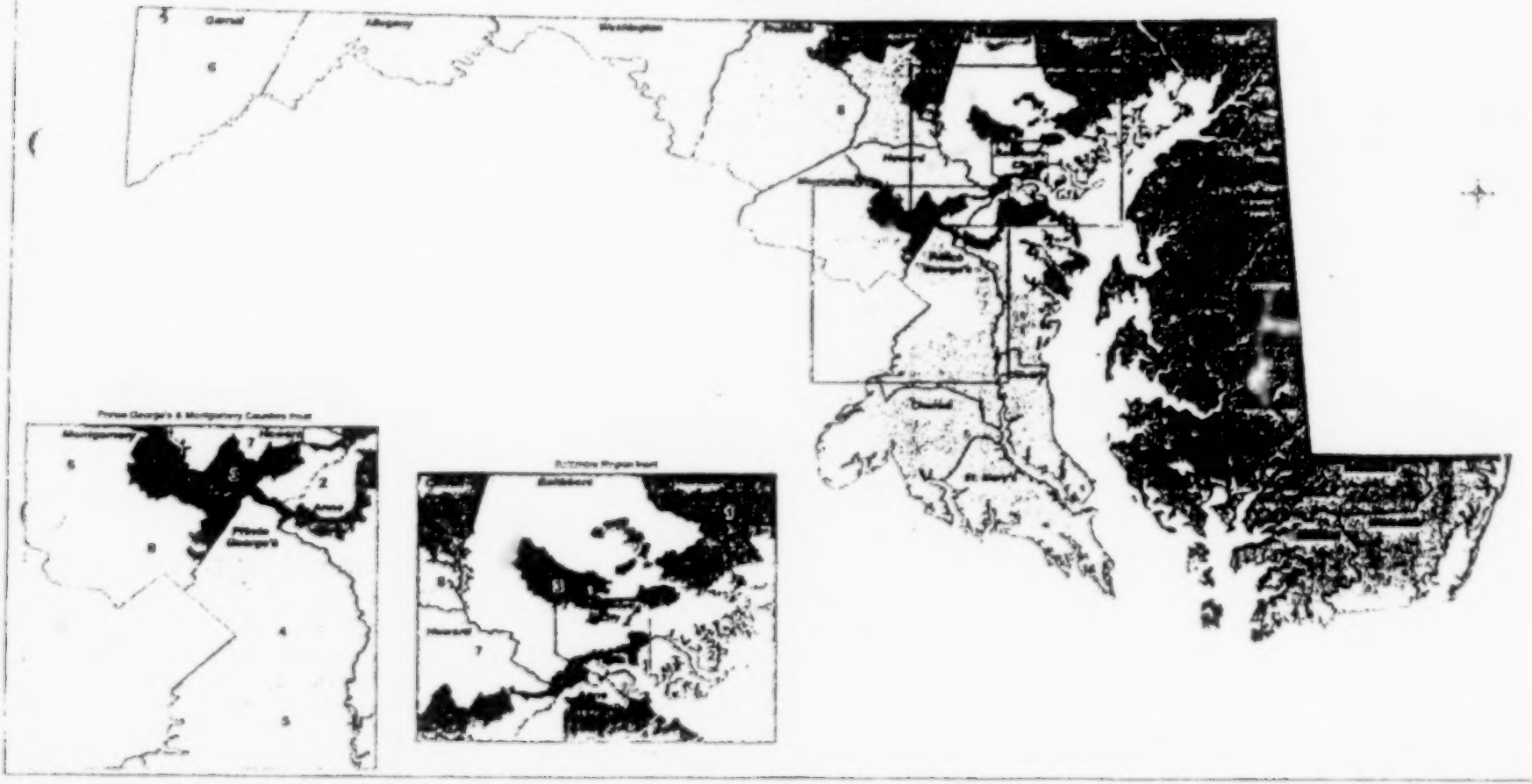


EXHIBIT 2

GRAC Submits Recommended Congressional Redistricting Plan to Governor, Releases Map

2010 Redistricting

Congressional Districts

On Tuesday, October 4, 2011, the Governor's Redistricting Advisory Committee (GRAC) submitted its recommended Congressional redistricting map to Governor Martin O'Malley and released the recommended map to the public. "The map we are submitting today conforms with State and federal law and incorporates the 331 comments we received from the public during our 12 regional hearings around the State," said Secretary Jeanne Hitchcock, Chair of the Advisory Committee. "We have developed a plan that reflects the population shifts, demographics, and strengths of our State."

Under the proposed plan, which builds off of the existing districts created in 2002, more than 70% of Marylanders will remain in their current Congressional district. At the same time, the recommended map restructures the Congressional districts to reflect population changes over the past decade reflected in the Census. Also, in contrast to the common practice in other States, the proposed map does not draw any incumbent Congressman out of his or her district. Each district conforms to the ideal Congressional district adjusted population of 721,529 residents.

Governor O'Malley formed the GRAC on July 4, 2011 for the purpose of holding 12 public hearings, receiving public comment and drafting a recommended plan for the State's legislative and congressional redistricting. The Governor will consider the proposed congressional plan and will introduce his own plan to the Maryland General Assembly during its special session beginning on October 17, 2011. The plan is open for public comment through October 11, 2011. Comments may be sent by email (Redistricting2011@mdp.state.md.us), via hard-copy (Redistricting 2011 Maryland Department of Planning, 11th Floor, 301 W. Preston St., Baltimore, MD 21201, ATTN: Linda Janey) or submitted on-line.

Highlights of the proposed map follow:

Congressional District 1

Congressional District 1 retains its character as an Eastern Shore, agricultural and rural district. The 8 Eastern Shore Counties are kept together and the District no longer crosses the Chesapeake Bay into Anne Arundel County, and instead runs into rural portions of Carroll County.

In the process of restructuring District 1, Harford County is no longer split into 3 Congressional Districts, a concern raised by residents of Harford County during the hearings.

Congressional District 2

Congressional District 2 retains its character of a BRAC corridor district, anchored on the Northeastern edge by Aberdeen Proving Grounds and the Chesapeake Bay shoreline of Harford County, through the Baltimore region, and anchored on the Southern edge by Ft. George G. Meade. This alignment allows for the residents most impacted by the Base Realignment and Closure process to elect a Congressmen capable of focusing on this important issue.

Greater Washington, D.C. Region

Over the past decade, there has been a clear expansion of what has commonly been considered the "Washington suburbs," a trend that is reflected in the proposed map. This expansion has been spearheaded by the migration of nearly 40,000 Prince George's County residents to Charles County and the migration of over 43,000 Montgomery residents to Frederick County. In revising Districts 4, 5, 6 and 8, the Committee drew 2 districts that are based in Southern Maryland/Prince George's County, and two districts that are based in Montgomery County and the I-270 Corridor, into Western Maryland. Public testimony in these regions reflected a desire to have a Congressional map that better reflected patterns in the region – the growth in Southern Maryland from Prince George's County, and the growth of the suburbs along I-270. The proposed map eliminated the current overlap of districts in Prince George's and Montgomery Counties (District 8 into Prince George's and District 4 into Montgomery) to better capture what is occurring in the State.

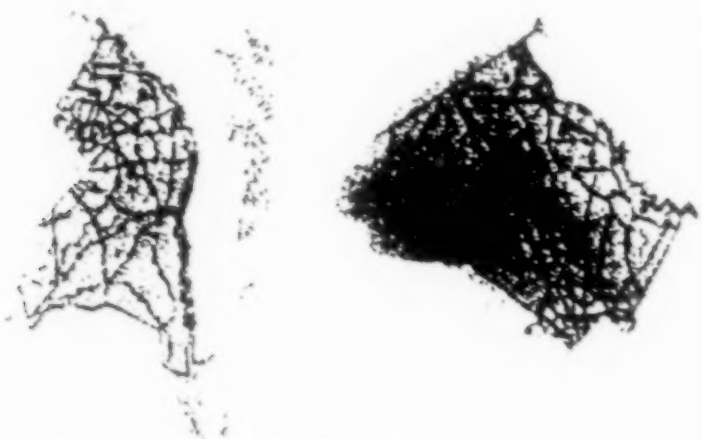
Congressional Districts 4 and 5

Congressional Districts 4 and 5 are composed of the Southern Maryland Counties (St. Mary's, Charles and Calvert), Prince George's County, and portions of Anne Arundel County. In drawing these districts, the Committee was mindful of the current alignment of District 5, which encompasses vital federal facilities including the Patuxent River Naval Air Station, Indian Head Naval Surface Warfare Center, Joint Base Andrews Naval Air Facility, the National Oceanic and Atmospheric Administration, the Food and Drug Administration, the U. S. Census Bureau, USDA Beltsville Agricultural Research Center, NASA's Goddard Space Flight Center, the National Archives II and the Smithsonian Environmental Research Center, the National Harbor waterfront development and the related research and economic development resources at the University of Maryland College Park.

Congressional Districts 6 and 8

Congressional Districts 6 and 8 are drawn to reflect the North-South connections between Montgomery County, the I 270 Corridor, and western portions of the State. All three western Maryland counties, Washington, Allegany and Garrett, were kept together.

Consistent with public testimony, the proposed map reduces the number of Congressional Districts in Prince George's County from 3 to 2, and reorients the Montgomery County districts to reflect population trends.



Baltimore Region

Congressional District 7

Congressional District 7 remains a district based in Baltimore City, with surrounding portions of Howard and Baltimore Counties that are primarily in the current 7th District. Congressional District 3 remains a Central Maryland district that incorporates portions of the Baltimore and suburban Washington regions.

EXHIBIT 16 OPTION E

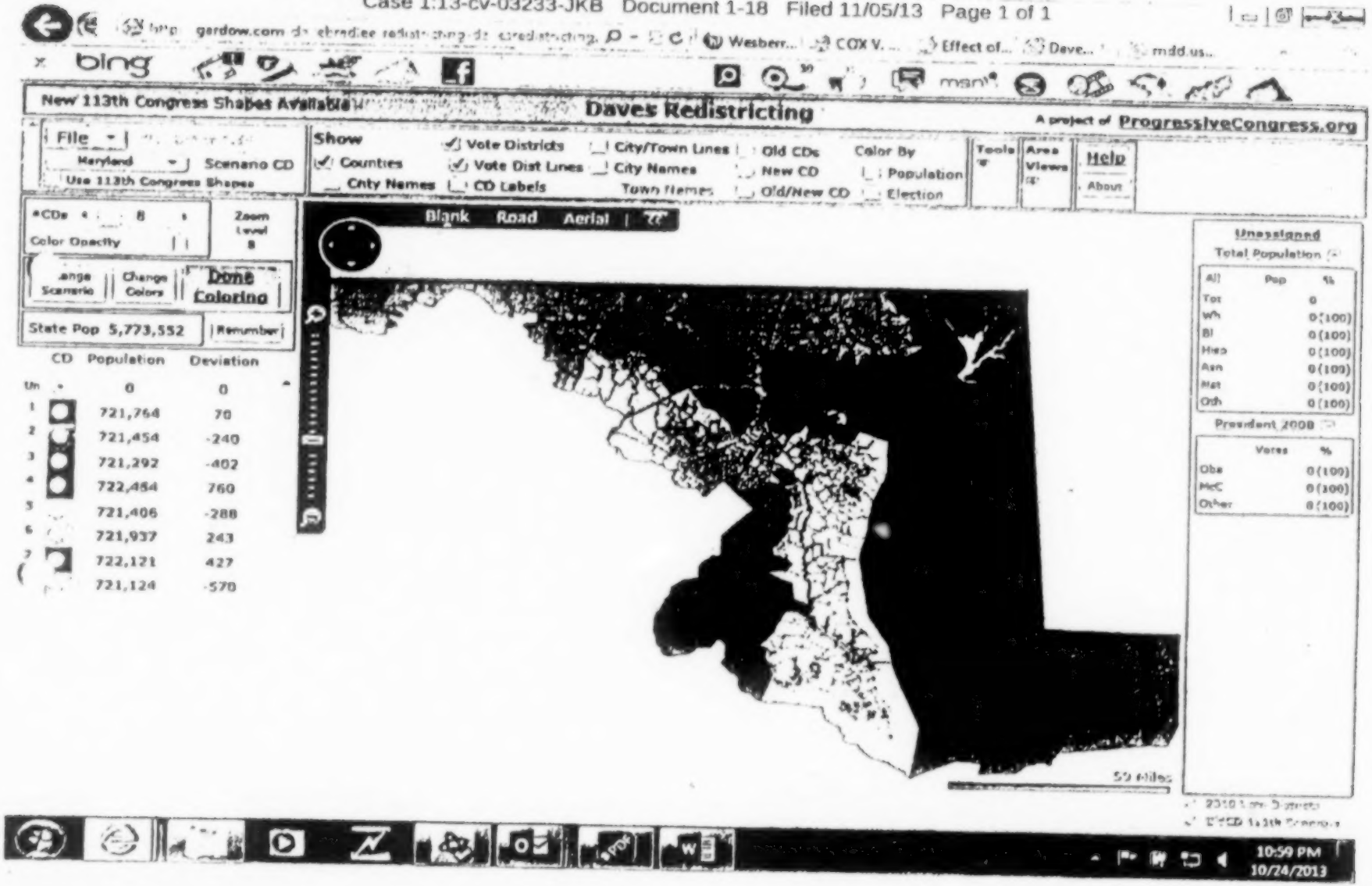


EXHIBIT 15 OPTION D

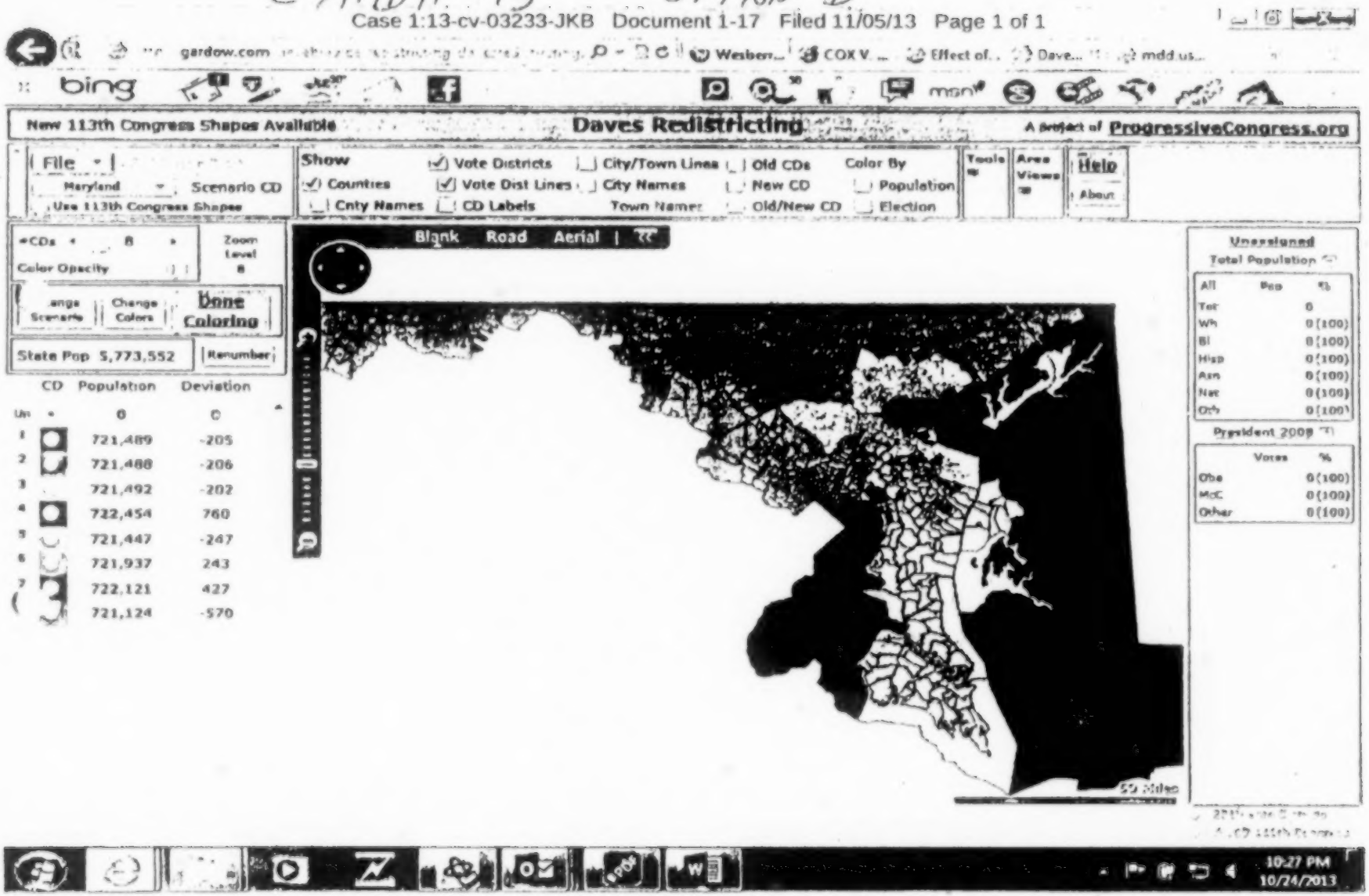


EXHIBIT 14 OPTION C-1

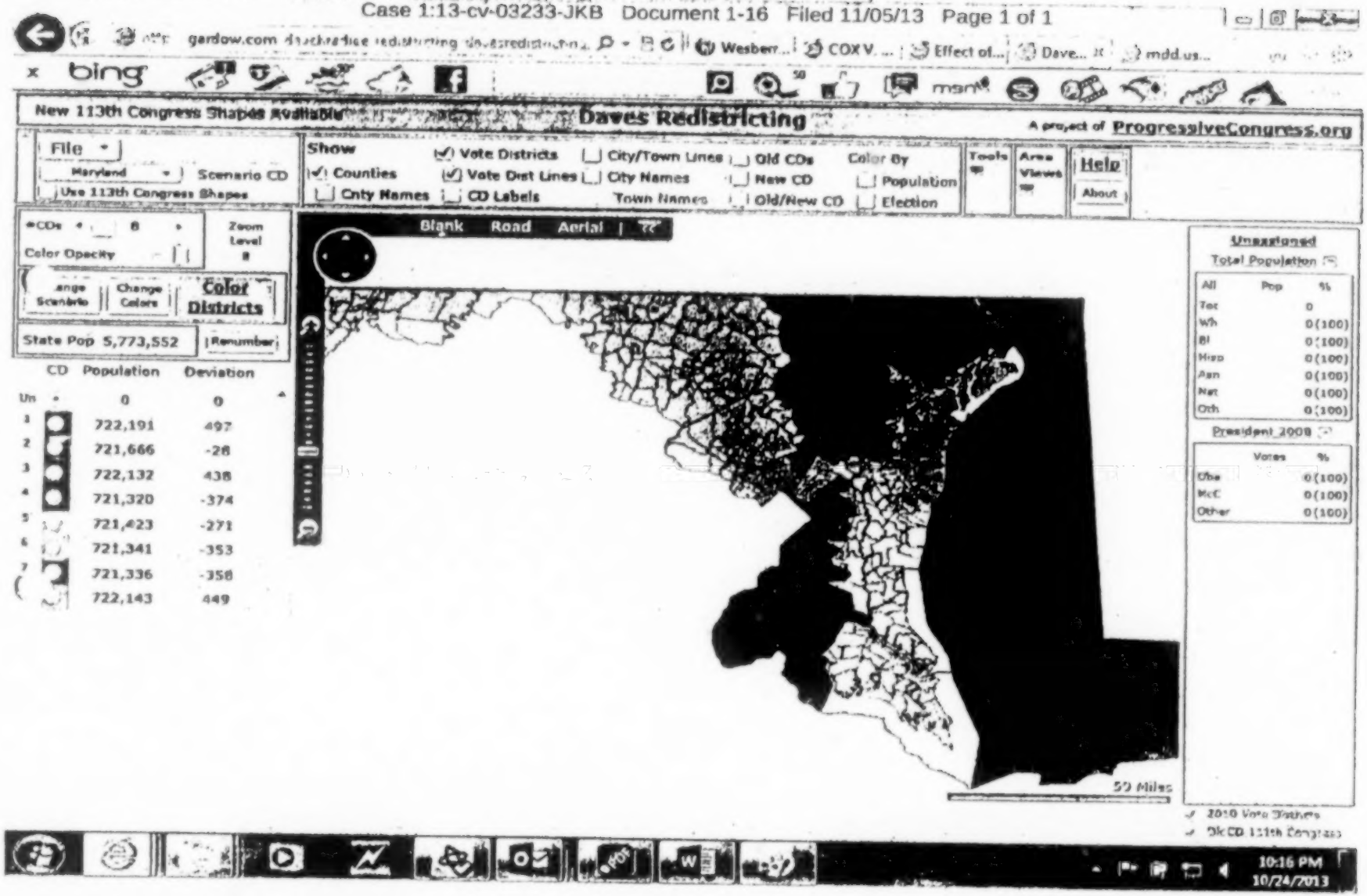


EXHIBIT 13 OPTION C

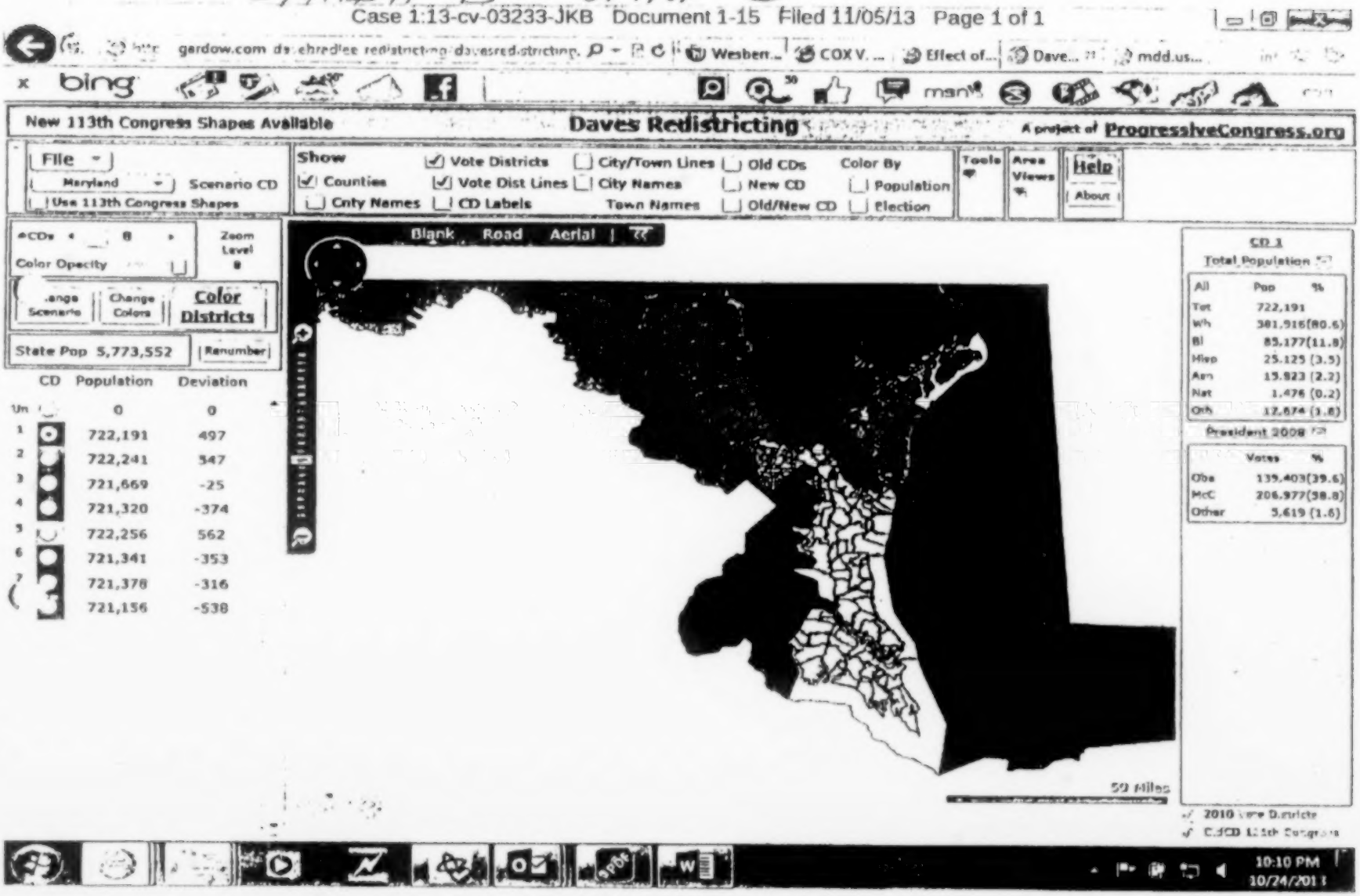


EXHIBIT 12 OPTION B

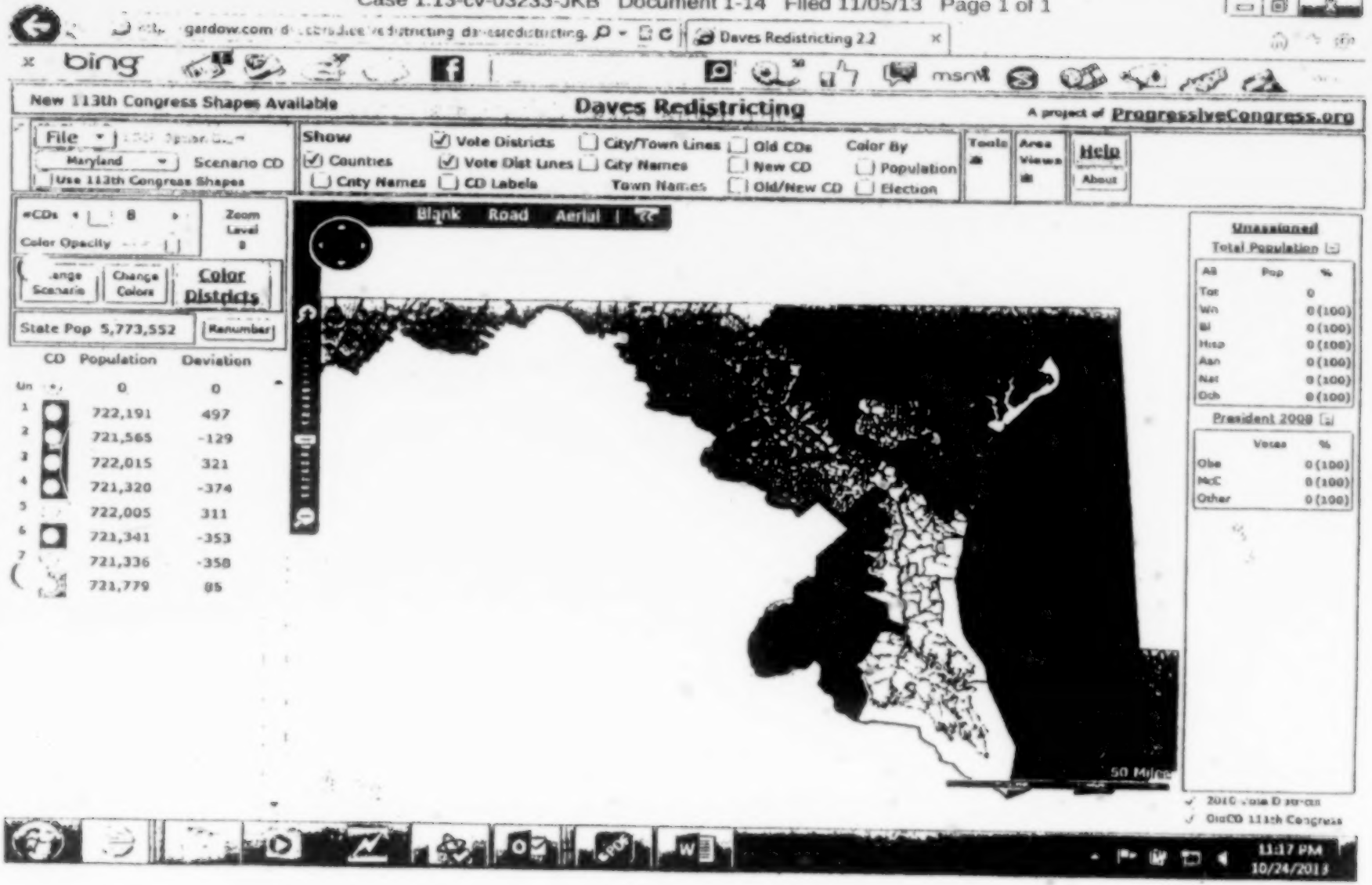


EXHIBIT 11 OPTION A

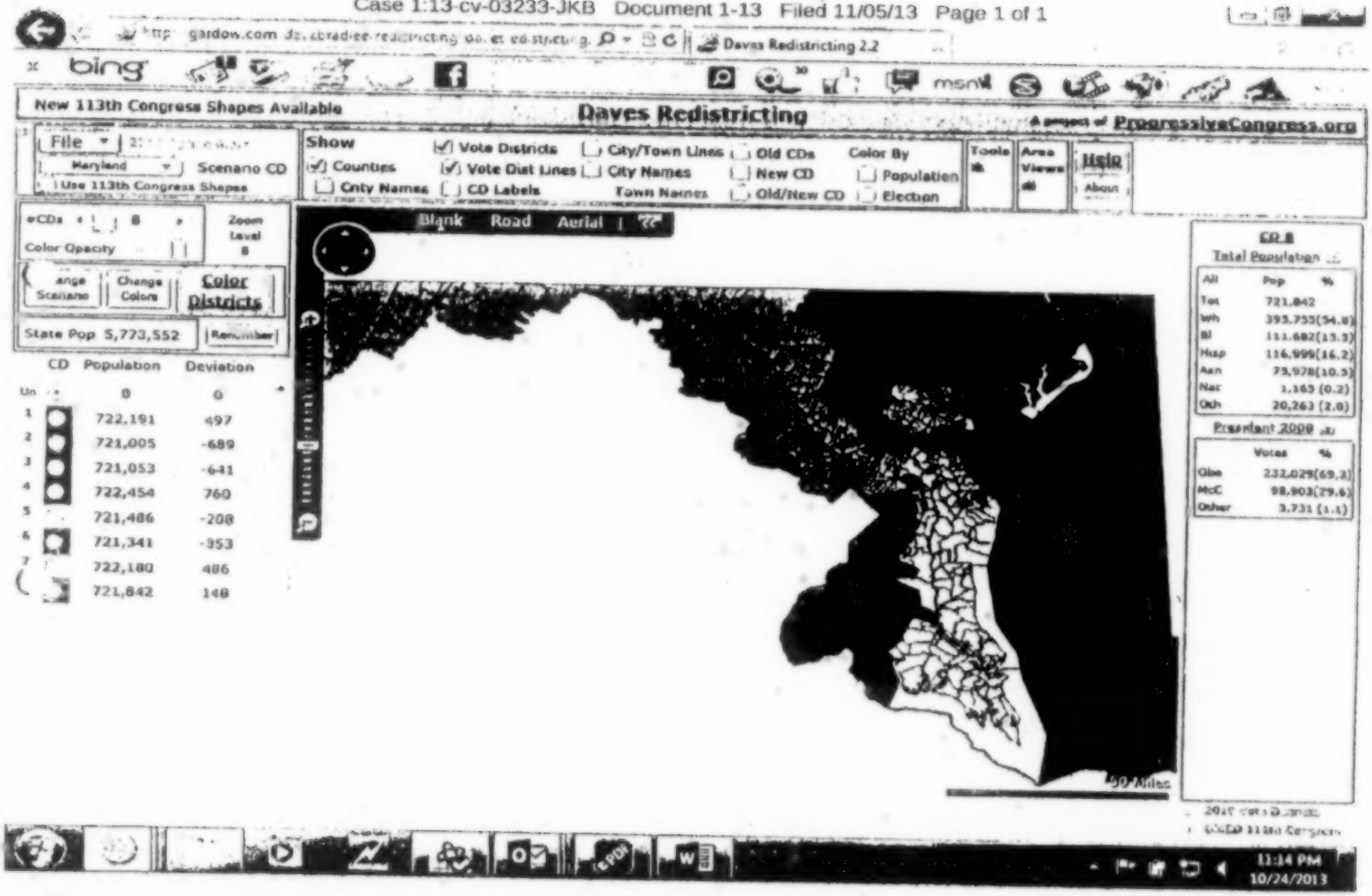
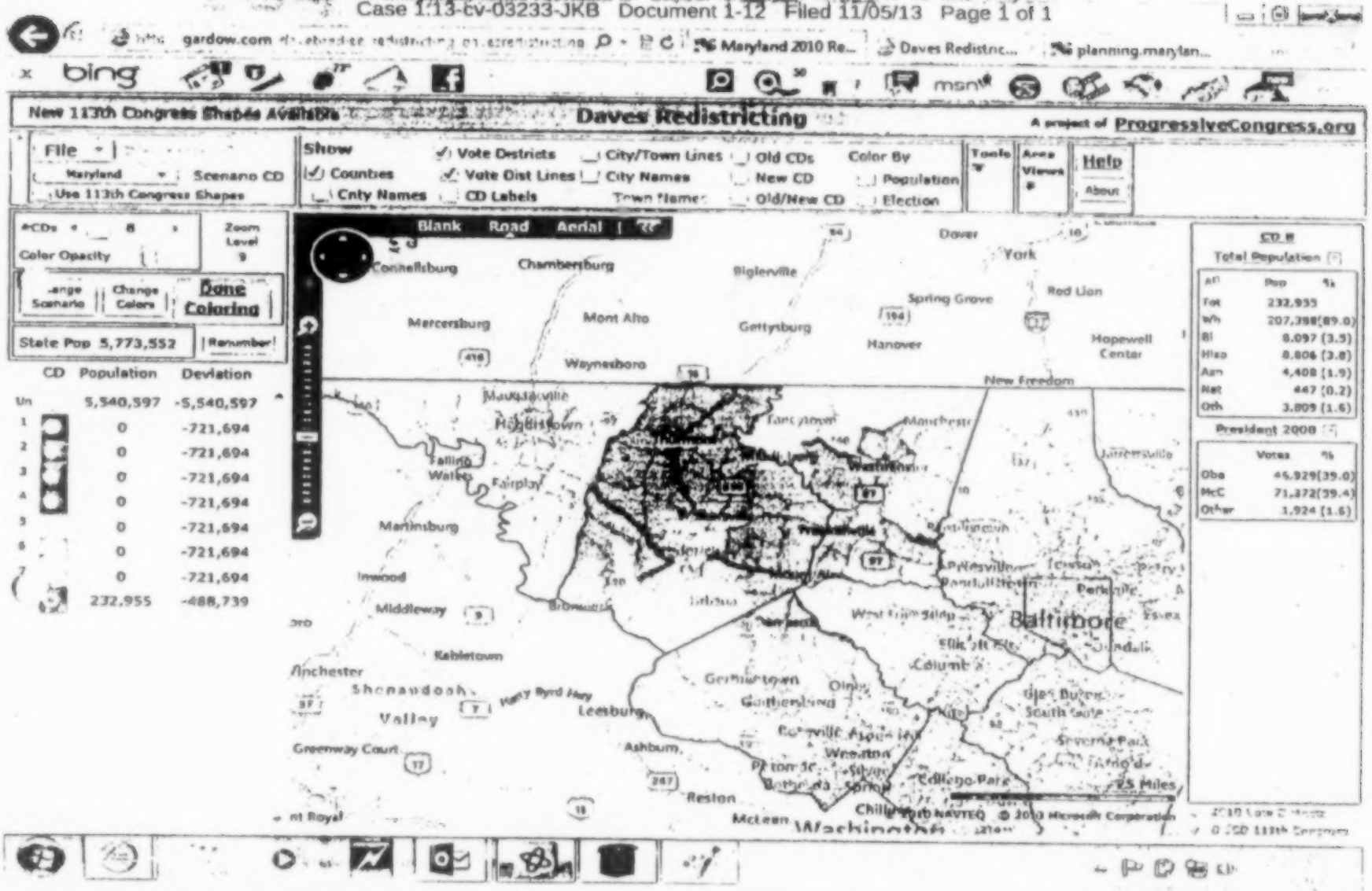


EXHIBIT 10 CD 8 SMALL SECTION



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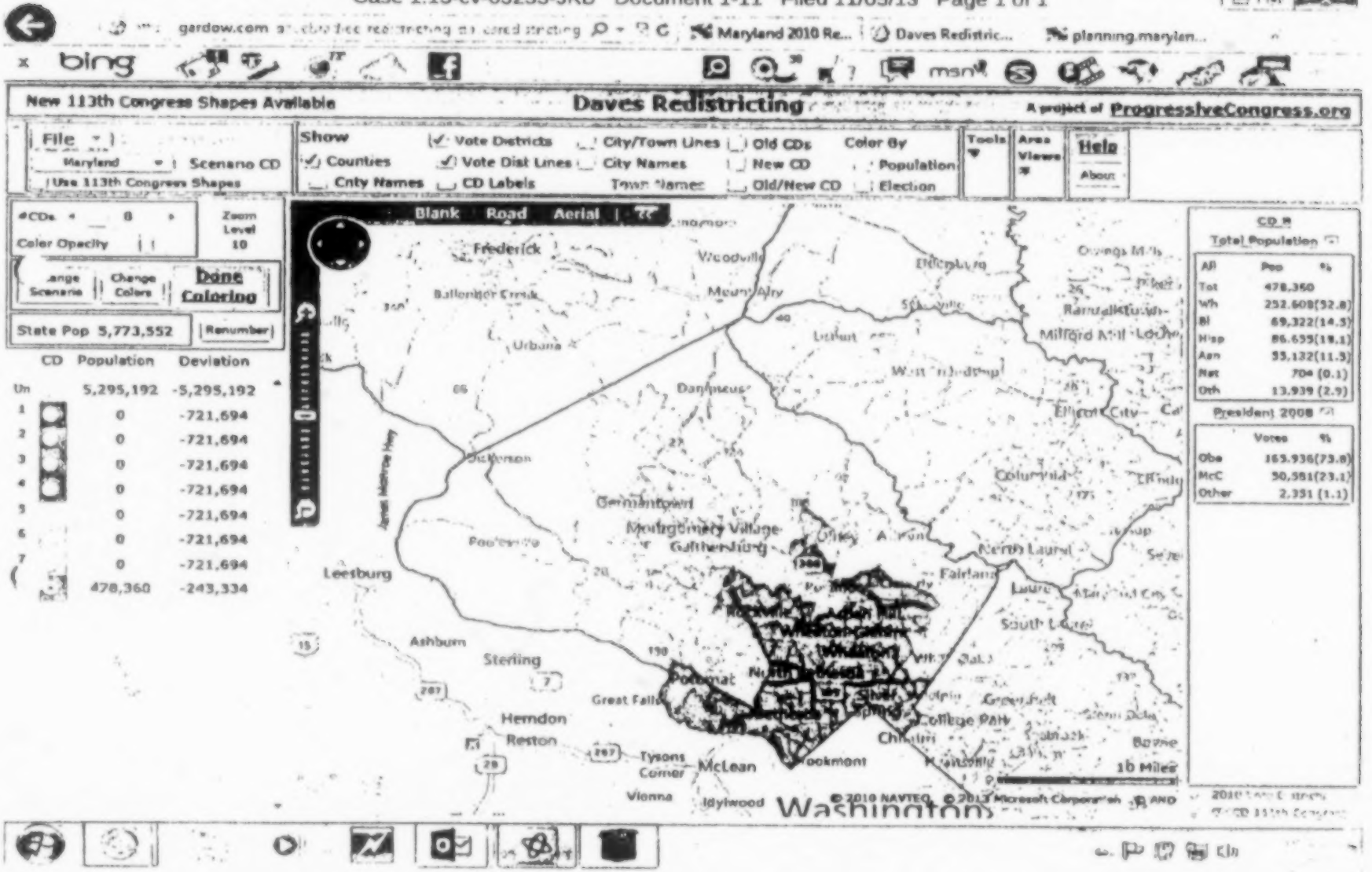

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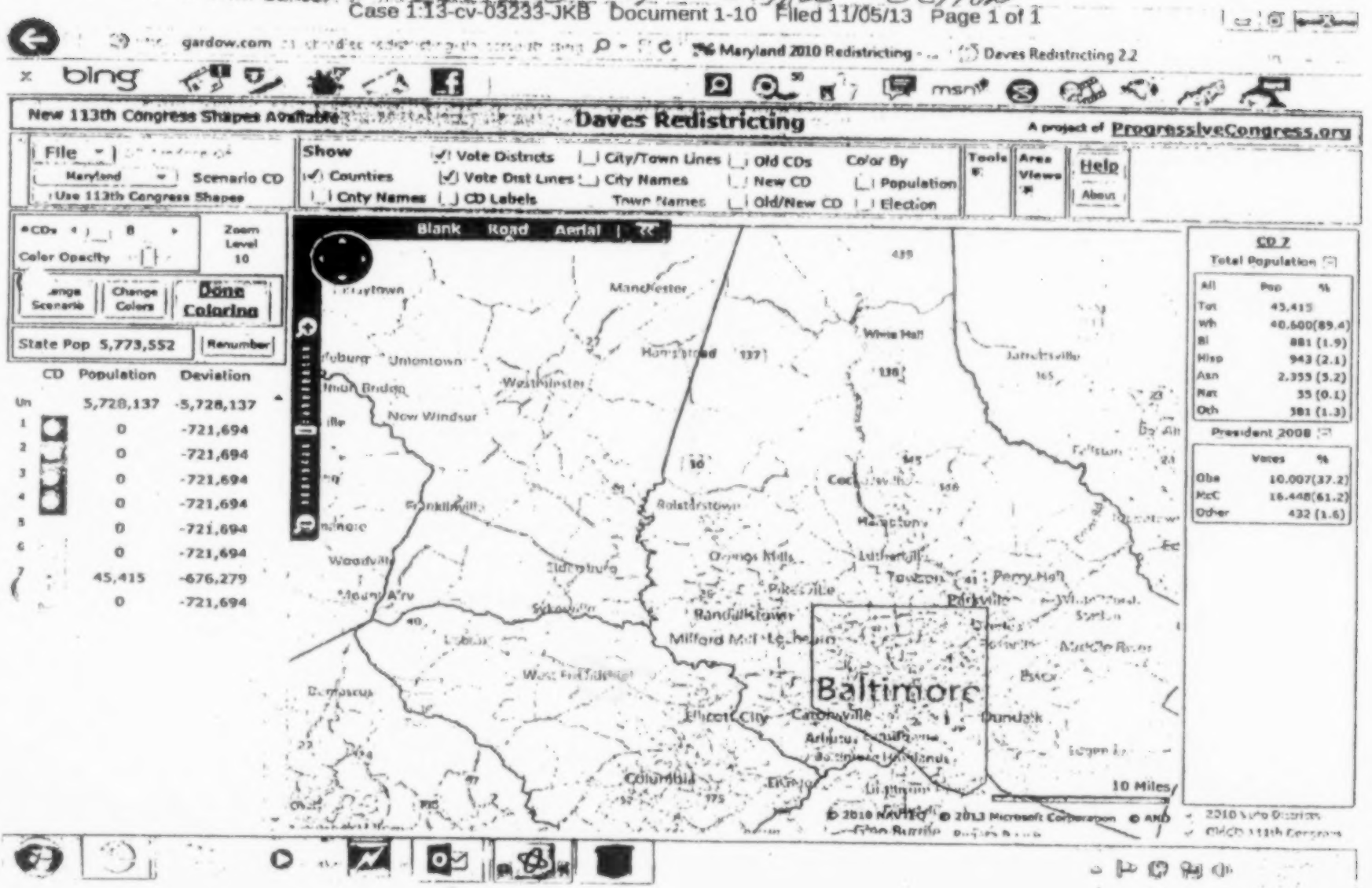

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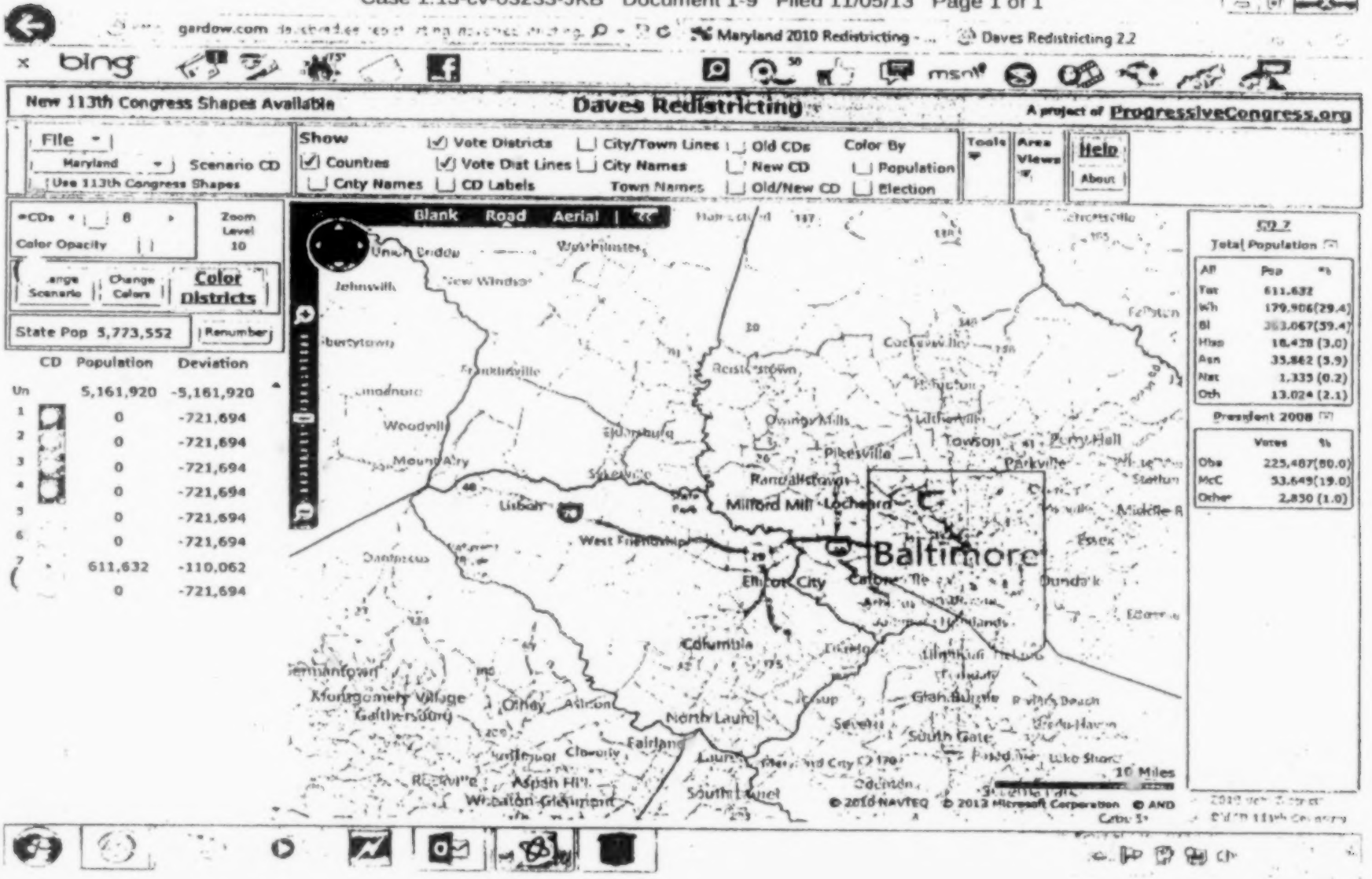
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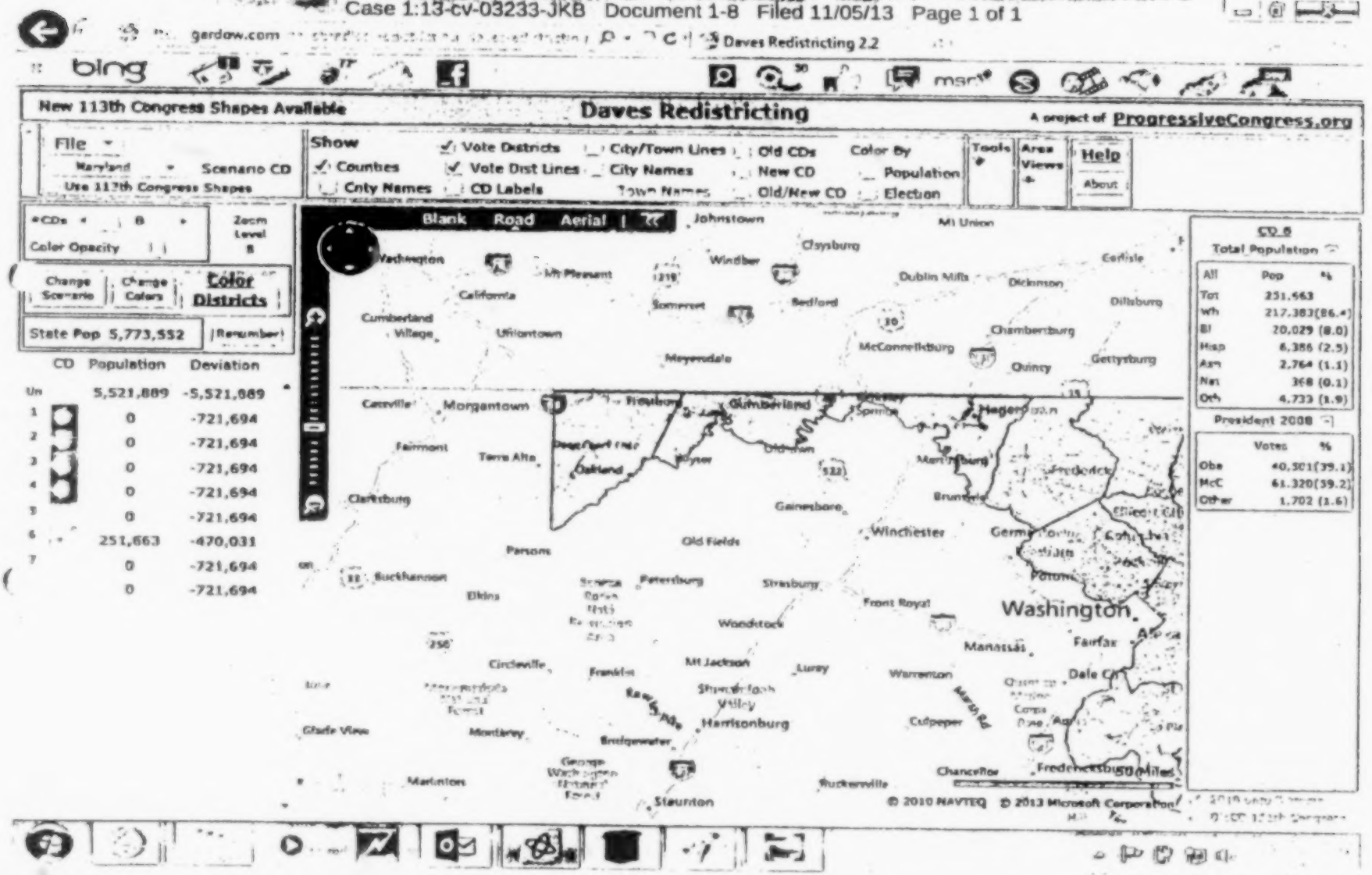
EXHIBIT 6 CD 6 : SMALL SECTION



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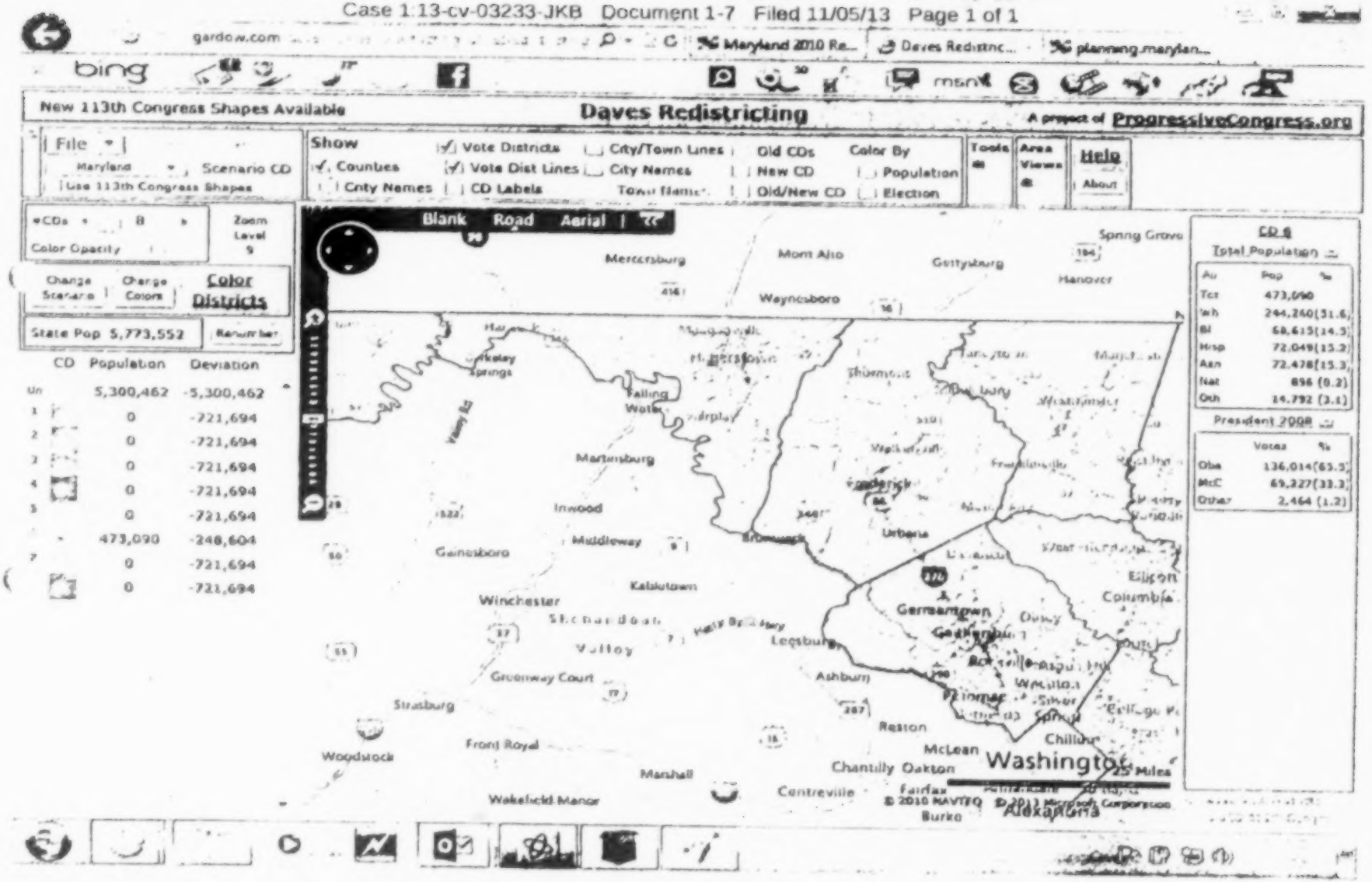

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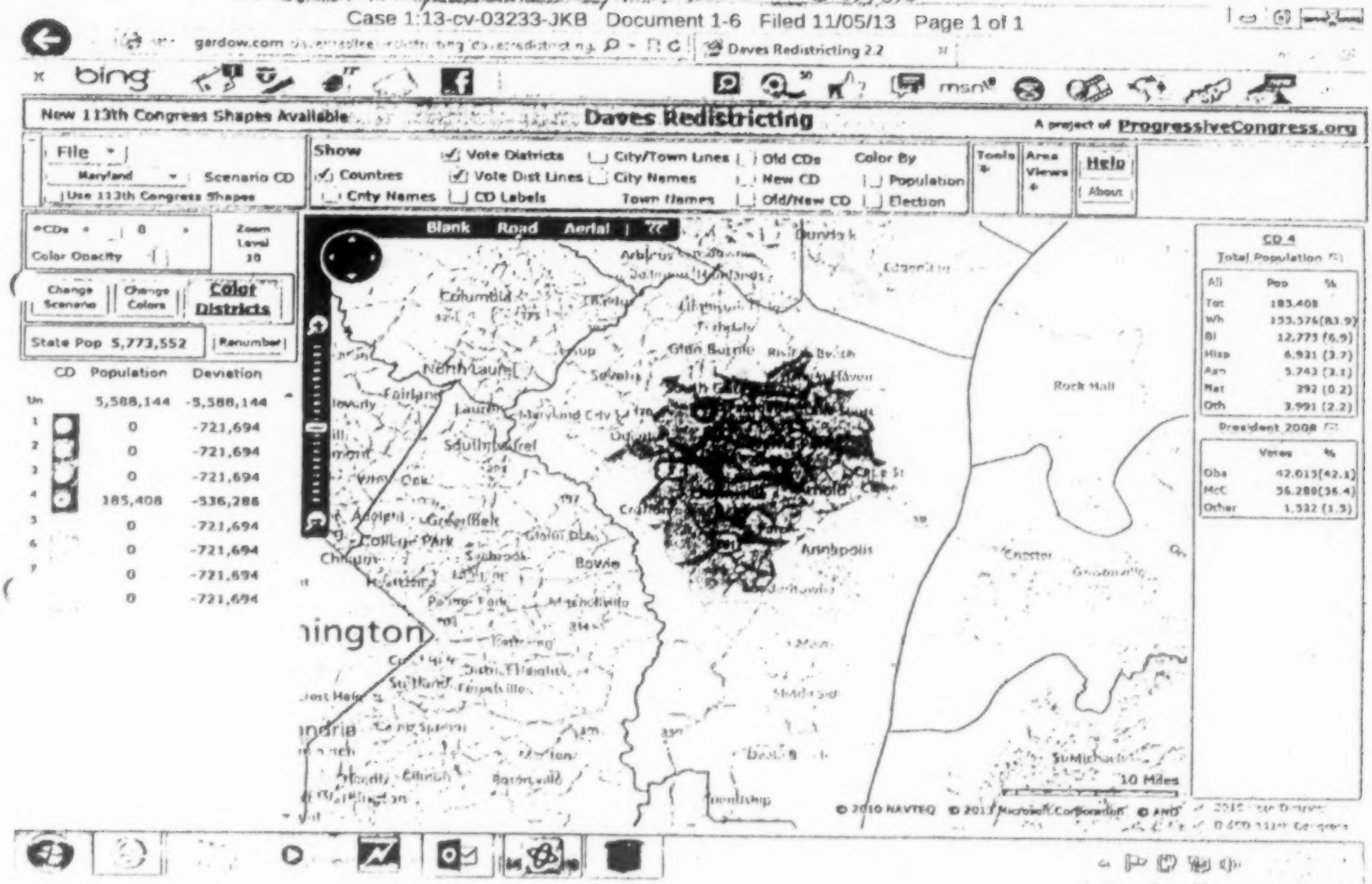

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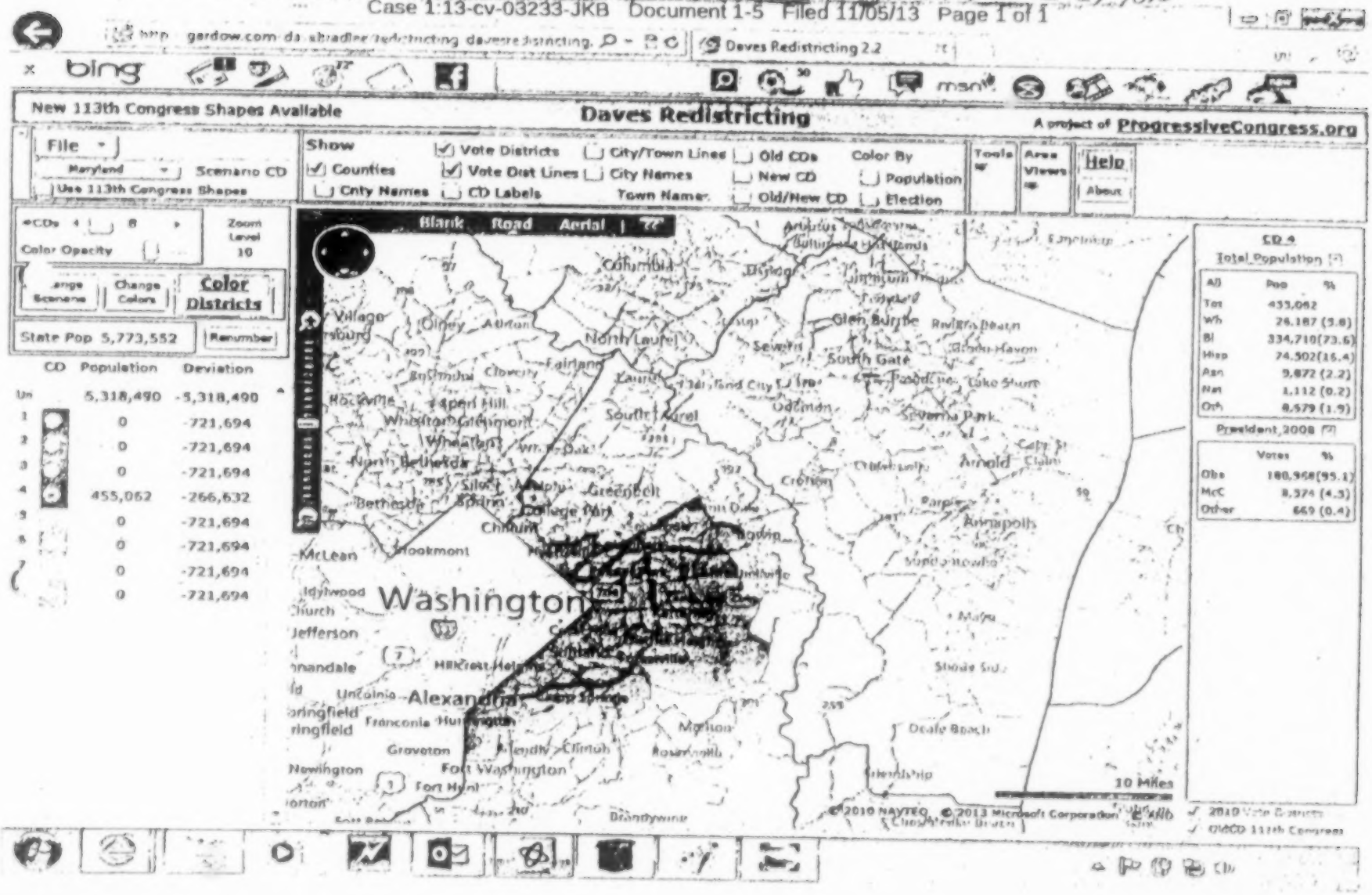

No. 14-990

IN THE

Supreme Court of the United States

STEPHEN M. SHAPIRO, O. JOHN BENISEK, AND MARIA B. PYCHA,

Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR JUDICIAL WATCH, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONER

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March 20, 2015

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INTEREST OF *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Judicial Watch believes that the decision below raises an important issue of federal election law that should be heard by this Court. In particular, Judicial Watch is concerned that the Fourth Circuit's ruling violates the Three-Judge Court Act and will allow states to delay judicial review of gerrymandered redistricting plans that disenfranchise voters and violate the Constitution. Judicial Watch has represented parties in two recent cases in Maryland concerning a ballot referendum on the state's gerrymandered redistricting plan. Moreover, Judicial Watch may wish to be involved in challenges to gerrymandering on behalf of members or clients in the future, and believes the federal judiciary should not be erecting further obstacles to review.

REASONS FOR GRANTING THE PETITION

This case cleanly presents a circuit split on the most fundamental question under the Three-Judge

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief more than 10 days prior to its due date. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

Court Act: when must a case covered by the Act be heard by a three-judge district court? The Three-Judge Court Act mandates that such courts hear all constitutional challenges to legislative redistricting, as well as certain actions under the Voting Rights Act, the Bipartisan Campaign Reform Act, and numerous other federal statutes[2]—unless the district judge to whom the case is initially assigned "determines that three judges are not required." 28 U.S.C. § 2284(b)(1). In that circumstance only, the single judge may dismiss the case instead of referring it to a three-judge court. However, this Court has long been clear—and, for decades, the circuits all agreed—that the bar for three-judge referral is quite low.

Under that standard, a claim must be heard by a three-judge court unless the claim is "obviously frivolous," "essentially fictitious," "wholly insubstantial," or "obviously without merit"—which occurs only when the claim's "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409 U.S. 512, 518 (1973) (quoting *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910)); *see also LaRouche v. Fowler*, 152 F.3d 974, 982 (D.C. Cir. 1998) ("The Supreme Court

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[2] These additional statutes include the Civil Rights Act of 1964, the Prison Litigation Reform Act, the Presidential Election Campaign Fund Act of 1971, the Child Internet Protection Act, and others. *See* 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 nn.3-5 (3d ed. 2014) (collecting examples).

made clear just how minimal a showing is required to establish substantiality in *Goosby v. Osser*."). Put differently, one-judge dismissal is appropriate only "if the claim is so insubstantial that it does not invoke federal jurisdiction," which "will be rare indeed." 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 (3d ed. 2014). As the petition explains, Petitioners' First Amendment claim plainly satisfies this undemanding standard. Pet. at 26-29.

In 2003, however, the Fourth Circuit parted ways with this long line of authority. Under *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), a case need not be referred to a three-judge court if the complaint fails to state a claim under Rule 12(b)(6). *Id.* at 772-73. The Fourth Circuit has thus replaced the longstanding test of frivolousness with a plausibility standard. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Rule 12(b)(6) requires "a claim to relief that is plausible on its face").

As the petition demonstrates, that rule conflicts with decisions from this Court as well as from the D.C., Second, Third, Fifth, and Seventh Circuits. *See* Pet. at 10-18 & n.4. And the Fourth Circuit's novel approach creates significant problems. For one, it enlists a single district judge to decide the legal sufficiency of a redistricting challenge (as part of any Rule 12(b)(6) motion). Such an allocation of authority cannot be squared with Congress's judgment—recognized by this Court and others—that apportionment challenges and other types of three-judge cases are too important to be decided in the first instance by a single judge. Nor is the difference between one and three judges merely a formality.

Redistricting cases raise difficult legal issues on which three-judge courts frequently divide, including at the motion-to-dismiss stage.

Moreover, with a plausibility standard, the question of whether a case should be dismissed by one judge or heard by three becomes far more ripe for dispute—with the possible need for appeals to the courts of appeals and even this Court. Such fights over whether three judges should *hear* the case can only delay adjudication of the case's actual merits. Particularly in redistricting cases, such delays can matter a great deal. Indeed, courts will sometimes decline to order relief in redistricting cases—even if there is a constitutional violation—simply because the election schedule leaves too little time to adjust district lines. This scenario is less likely with the traditional frivolousness standard for referral, which expedites three-judge consideration of the merits. The Fourth Circuit's rule, in contrast, can only slow these cases down.

In short, the split in authority on the standard for three-judge referral has great significance. This Court should resolve the conflict among the circuits on this question fundamentally important to all redistricting challenges and, indeed, all other cases implicating the Three-Judge Court Act.

I. THE FOURTH CIRCUIT'S RULE DEFEATS THE PURPOSE OF THREE-JUDGE COURTS BY HAVING ONE JUDGE DECIDE A CLAIM'S LEGAL PLAUSIBILITY.

Three-judge district courts are "a unique feature of our jurisprudence." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). They are available only "when an action is filed challenging the constitutionality of the

apportionment of congressional districts or the apportionment of any statewide legislative body" or "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). Such cases call for proceedings markedly different from the typical federal lawsuit.

Specifically, when a three-judge court is requested, the judge to whom the suit was initially assigned "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284(b)(1). Those three judges—the initially assigned district judge, a circuit judge, and a third judge—"shall serve as members of the court to hear and determine the action or proceeding." *Id.* Although a single member of the three-judge court "may conduct all proceedings except the trial" and can enter most "orders permitted by the rules of civil procedure," only the full three-judge panel may "appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." 28 U.S.C. § 2284(b)(3). In addition, "[a]ny action of a single judge may be reviewed by the full [three-judge] court at any time before final judgment." *Id.* Appeals from three-judge district courts are taken directly to this Court. *See* 28 U.S.C. § 1253.

When enacting this "exceptional procedure," Congress "sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge." *Phillips v. United States*, 312 U.S. 246, 250 (1941). But Congress was also careful to make three-judge courts available only for "a limited

class of cases of special importance." *Id.* at 249 (quoting *Ex parte Collins*, 277 U.S. 565, 567 (1928)). That class of cases shrank in 1976, when Congress amended the Three-Judge Court Act. *See generally* Wright, Miller, Cooper & Amar, *supra*, § 4235 (discussing Act's evolution).[3] However, Congress "preserve[d] three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because *these issues are of such importance* that they ought to be heard by a three-judge court." S. Rep. No. 94-204, at 9 (1976) (emphasis added); *accord Page v. Bartels*, 248 F.3d 175, 190 (3d Cir. 2001) (quoting *id.*) (noting "the unique importance of apportionment cases"). Thus, as this Court subsequently put it, lawsuits implicating the current Three-Judge Court Act "raise issues that are likely to be *of great importance* and in Congress' judgment justify a three-judge court, expedited review, and direct appeal to this Court." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985) (emphasis added) (addressing claims under Presidential Election Campaign Fund Act).

By requiring that single judges considering three-judge referral should decide whether the complaint can survive a Rule 12(b)(6) motion, the Fourth Circuit pays little heed to the importance of the cases covered by the Three-Judge Court Act, and to Congress's preference to "not leav[e] the fate of such litigation to a single judge." *Phillips*, 312 U.S. at 250. A motion to dismiss under Rule 12(b)(6) calls for an

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[3] Three-judge courts are no longer available for all constitutional challenges to state laws, for example.

assessment of both the allegations' factual plausibility as well as their "legal sufficiency"—such that a court must accept or reject a plaintiff's legal theory. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Accordingly, few events in a case are as important as a Rule 12(b)(6) motion to dismiss. Such motions are precisely what three-judge courts should be *deciding*, given that these courts exist to ensure "greater deliberation" of the significant cases at issue. *Phillips*, 312 U.S. at 250. By instead using motions to dismiss to *limit access* to three-judge courts, the Fourth Circuit has turned the Three-Judge Court Act's purpose and framework on its head.

This is no small matter. The cases implicated by the Three-Judge Court Act are not just important but also often legally contentious. Indeed, three-judge courts regularly split 2-1 when deciding motions to dismiss in apportionment cases. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Adams v. Clinton*, 90 F. Supp. 2d 35 (D.D.C. 2000); *Johnson v. Mortham*, 915 F. Supp. 1529, 1559 (N.D. Fla. 1995); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd*, 509 U.S. 630 (1993).[4] If filed in the Fourth Circuit today, these cases might not even be *referred* to a three-judge court, depending on the views of the judge who initially drew the case. There is no basis for such a result, which flies in the face of the Three-Judge Court Act's very reason for existence.

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[4] Though decided in the Fourth Circuit, *Shaw* predated *Duckworth*'s adoption of a plausibility standard for three-judge referral.

II. THE FOURTH CIRCUIT'S RULE INVITES SIGNIFICANT PRACTICAL PROBLEMS.

Collapsing Rule 12(b)(6) and three-judge referral, as the Fourth Circuit has done, also invites major practical difficulties. These problems underscore how dramatically the Fourth Circuit's approach departs from what Congress intended.

As noted, Congress has provided that a three-judge court's decisions may be appealed directly to this Court, which is "a means of accelerating a final determination on the merits." *Swift*, 382 U.S. at 119. The circuits may still hear appeals in these cases, but only with respect to whether three-judge referral was wrongly denied. *See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962) (per curiam). When that question turns on whether the case is "obviously frivolous," *Goosby*, 409 U.S. at 518, denials are less likely, and any appeals should be faster to resolve.

Not so in the Fourth Circuit. Under *Duckworth*, single-judge courts deny referral more frequently, as the petition explains. Pet. at 18-20. Though these denials can be appealed to the court of appeals, such appeals—by turning on the more nuanced Rule 12(b)(6) standard—will likely take longer to decide. And the losing party could then seek this Court's discretionary review of any decision—all, again, just to determine whether a three-judge court should even *hear* the case.

The inefficiencies of the Fourth Circuit's rule are not limited to cases in which referral is denied. Even if a Fourth Circuit district judge grants referral by rejecting a motion to dismiss, the two judges then added to the panel might believe that the motion

should have gone the other way. These judges could overrule their fellow panelist's initial judgment. *See* 28 U.S.C. § 2284(b)(3) ("Any action of a single judge may be reviewed by the full court at any time before final judgment."). And the mere possibility of such a reversal will accordingly invite relitigation of the motion to dismiss that had just been decided. Even if the first judge's ruling holds up (because one of the two new judges agrees with it), the Rule 12(b)(6) battle will have taken two rounds instead of one.

These delays matter, especially in redistricting cases. As a general matter, any inefficiencies in these cases run counter to Congress's attempts to "accelerat[e] a final determination on the merits" in such litigation. *Swift*, 382 U.S. at 119. But the pace of a redistricting case can also affect not just when but *how* the case is decided.

Three-judge courts must "act and rely upon general equitable principles" when weighing possible remedies in redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). And timing considerations—such as "the proximity of a forthcoming election"—can preclude relief "even though the existing apportionment scheme [is] found invalid." *Id.*; *see also, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements."); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam) (affirming the district court's decision allowing state legislative elections to proceed even though districting plan was "constitutionally infirm in certain respects").

This concern is far from theoretical. Courts regularly deny immediate relief in redistricting cases not because the underlying constitutional claim lacks merit, but because of timing. *See, e.g.*, *Page v. Va. State Bd. of Elections*, No. 3:13-cv-678, 2014 WL 5019686, at *17-18 (E.D. Va. Oct. 7, 2014) (three-judge court) (holding districting plan unconstitutional, but allowing elections to proceed under that plan because the general election was "roughly two months away"); *MacGovern v. Connolly*, 637 F Supp. 111, 115 (D. Mass. 1986) (three-judge court) (dismissing "substantively viable" redistricting challenge because of impending election, such that new district lines would "cause enormous disruption to Massachusetts voters, to candidates, and to the electoral process"); *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996) (three-judge court) (assuming that challenge would prevail on merits and denying relief because "the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time"); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994) (three-judge court) (holding Texas district map unconstitutional but permitting its use in upcoming election), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996).

The traditional standard for three-judge referral reduces the odds that timing will force a court to tolerate a constitutional violation—for when the initial judge is simply making sure the challenge is not "obviously frivolous," *Goosby*, 409 U.S. at 518, it is unlikely that a case will linger while the judge considers referral. But when that judge is instead

applying the Fourth Circuit's more demanding standard for referral, *see Duckworth*, 332 F.3d at 772-73, the initial decision may take longer, referral-related appeals (including to this Court) are more likely, and it could take significantly longer before a three-judge court even has the opportunity to reach the merits of the challenge. And when the clock is always counting down towards the next election, such a delay can control whether the alleged constitutional violation can be remedied or if it is something that a state's voters simply must swallow. In the Fourth Circuit alone, the Three-Judge Court Act's ability to protect against such scenarios is substantially weakened.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 20, 2015

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No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA

Petitioners,

v.

DAVID J. MCMANUS, JR., CHAIRMAN,
MARYLAND STATE BOARD OF ELECTIONS; AND
LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

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QUESTION PRESENTED

May a single-judge district court determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)?

PARTIES TO THE PROCEEDINGS

This action was originally filed against Bobbie S. Mack, in her official capacity as chair of the State Board of Elections; and Linda S. Lamone, in her official capacity as State Administrator of Elections.

During the pendency of this action, Ms. Mack was succeeded by David J. McManus, Jr. as chair of the State Board of Elections. Pursuant to this Court's Rule 35.3, Mr. McManus is "is automatically substituted as a party" for Ms. Mack.

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Three-Judge Court and Six-Person Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary, 93rd Cong. 5 (1973-1974) ..... *passim*

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is reported at 584 F. App'x 140. The district court's order granting respondents' motion to dismiss (Pet. App. 3a-21a) is reported at 11 F. Supp. 3d 516.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 2014. A timely petition for rehearing and rehearing en banc was denied on November 12, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The Three-Judge Court Act, 28 U.S.C. § 2284, provides in relevant part:

(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented,

shall serve as members of the court to hear and determine the action or proceeding.

* * *

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

STATEMENT

This case presents the question whether a single-judge district court may determine that three judges are not required in an action otherwise covered by the Three-Judge Court Act, on the ground that the complaint fails to state a claim under Rule 12(b)(6). The Fourth Circuit, in *Duckworth* v. *State Administrative Board of Election Laws*, 332 F.3d 769 (2003), answered that question affirmatively, but without explanation. That answer is wrong in every conceivable respect: It offends the statutory text, upsets the statutory scheme, ignores the rule against complex jurisdictional tests, and undermines the Act's settled purposes. It should

not stand. Because petitioners' First Amendment claim is not obviously frivolous, this Court should vacate the judgments of the lower courts and remand the case with instructions to refer this entire action to a district court of three judges.

A. Statutory background

1. The original Three-Judge Court Act

a. In *Ex parte Young*, 209 U.S. 123 (1908), this Court held that federal district courts may prospectively enjoin state officials from enforcing unconstitutional statutes. Prior to then, the district courts "had occasionally issued injunctions at the behest of private litigants against state officials to prevent the enforcement of state statutes, but such cases were rare and generally of a character that did not offend important state policies." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 117 (1965). Thus, "[a] 'storm of controversy' raged in the wake of *Ex parte Young*, focusing principally on the power of a single federal judge to grant ex parte interlocutory injunctions" that single-handedly disrupted the operation of duly-enacted state laws. *Steffel* v. *Thompson*, 415 U.S. 452, 465 (1974).

Congress responded in 1910 with the Three-Judge Court Act. As originally enacted, the statute provided that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State" could issue "upon the ground of the unconstitutionality of such statute," unless the application was "presented to a justice of the Supreme Court of the United States or to a circuit judge" and "heard and determined by three judges." See Act of June 18, 1910, ch. 309, § 17, 36 Stat. 539, 557. The Act provided further that "[a]n appeal may be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and

hearing, an interlocutory injunction in such case." *Ibid.* Congress soon thereafter amended the statute to cover applications for permanent injunctions, as well. See Act of Feb. 13, 1925, ch. 299, § 238, 43 Stat. 936, 938.

With the Three-Judge Court Act, Congress sought to achieve two well-recognized goals: ensuring greater and more careful deliberation, and speeding final resolution of the case.

First, Congress intended to relieve the public's unease with placing in the hands of a single federal judge the authority to decide injunctions against the enforcement of duly-enacted state laws. *Swift*, 382 U.S. at 118. Not only do three judges speak with greater authority and "dignity" than a single judge (David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 7 (1964)), but the procedure "allow[s] a more authoritative determination and less opportunity for individual predilection in sensitive and politically emotional areas." *Swift*, 382 U.S. at 119. Thus, the Three-Judge Court Act "thr[e]w additional safeguards around the exercise of the enormous power" recognized in *Ex parte Young* and helped avoid "irresponsible" decisionmaking by single judges. 42 Cong. Rec. 4852, 4853 (1908) (statement of Sen. Bacon).

Second, Congress recognized that the "far reaching importance" of certain cases meant "that every reasonable means should be provided for speeding the litigation." 36 Cong. Rec. 1679 (1903) (statement of Sen. Fairbanks) (debate concerning three-judge review in antitrust cases). Thus, Congress "sought to minimize the delay incident to a review upon appeal from an order granting or denying an interlocutory injunction" (*Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10, 14 (1930)) by "authoriz[ing] direct review by this Court" and

thereby "accelerating a final determination on the merits" (*Swift*, 382 U.S. at 119).

Congress in 1937 extended the three-judge court procedure to apply to requests for injunctions against enforcement of federal laws, as well. See Act of Aug. 24, 1937, ch. 754, § 2, 50 Stat. 751, 752. The purpose underlying that expansion paralleled the justifications for the original enactment: Requiring three judges would both ensure more careful decisionmaking (81 Cong. Rec. 7045 (1937) (statement of Sen. O'Mahoney)) and "expedite decision of important cases" by providing "for direct appeals to the Supreme Court" (Currie, *supra*, at 11 (citing 81 Cong. Rec. 3153, 3254, 3255, 3268, 3273 (1937) (Statements of Rep. Michener, Rep. Sumners, and Rep. Chandler); H.R. Rep. No. 212, 75th Cong., 1st Sess. 1, 7 (1937)).

b. In 1948, Congress consolidated the scattered provisions of the Act, creating the precursor version of Section 2284, which is the subject of this appeal. See Act of June 25, 1948, ch. 646, 62 Stat. 869, 928.

As of 1948, the Three-Judge Court Act provided that injunctions against the enforcement of either state or federal statutes on the ground of repugnance to the Constitution "shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U.S.C. §§ 2281, 2282 (1952). Section 2284, in turn, provided that in cases "required" to be heard by three judges, initial applications for relief were to be presented to a single district judge who, upon "the filing of the application * * * shall immediately notify the chief judge of the circuit, who shall designate two other judges" to "serve as members of the court to hear and determine the action or proceeding." 28 U.S.C. § 2284(1) (1952).

Section 2284 further permitted any single judge sitting on the three-judge panel to enter "all orders required or permitted by the rules of civil procedure," but forbade any single judge from "dismiss[ing] the action" or "enter[ing] a summary or final judgment." 28 U.S.C. § 2284(5) (1952).[1]

As part of the 1948 consolidation, Congress separately codified Section 1253, which provided (and still provides today) that "any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1952).

2. The present-day statute

a. Following passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the far-reaching scope of the Three-Judge Court Act soon became untenable. By the early 1970s, more than 300 three-judge district courts were being convened each year. See Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. Mich. J.L. Reform 79, 91 tbl. 1 (1996). This Court was deciding appeals in nearly all of those cases, including more than fifty per Term after full briefing and argument, comprising nearly one third of the Court's plenary docket. *Id.* at 107 & tbl. 2.

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[1] Because the Three-Judge Court Act permits single judges who are members of the three-judge court to hold certain hearings and decide certain issues unilaterally, we distinguish in this brief between the actions of a "single judge" (which take place after a three-judge court has been convened) and the actions of a "single-judge district court" (which take place before a three-judge court has been convened).

Beyond that, there was concern that, with the oversized volume of three-judge cases, the appellate process for determining when three judges are required had begun to undermine the purposes of the Act. This Court held early in the history of the Three-Judge Court Act that the statute "does not require three judges to pass upon [the] initial question of jurisdiction." *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam). Thus, the single judge to whom an application for injunctive relief was presented could decide that "[a] three-judge court is not required [because] the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974).

One ground for finding that the court lacked jurisdiction was that the constitutional claims presented were insubstantial: "Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial" or "legally speaking nonexistent." *Bailey* v. *Patterson*, 369 U.S. 31, 33 (1962) (per curiam). Accord *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975) ("general subject-matter jurisdiction is lacking when the claim of unconstitutionality is insubstantial."). "A claim is insubstantial" in the jurisdictional sense "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) (quoting *Poresky*, 290 U.S. at 32).

The substantiality rule created a jurisdictional complication: While appeals from judgments in cases heard by three-judge courts lie with this Court in the first instance under Section 1253, this Court had held

that "dismissal[s] of a complaint by a single judge" on the ground that a three-judge court is not required are "reviewable in the court of appeals." *Gonzalez*, 419 U.S. at 100. Thus, "courts of appeals [were] brought into the picture [only] to determine whether or not the single judge has improperly failed to call a court," and in the event of a reversal, "the case [would go] back down to the district court where * * * the case starts all over again." *Three-Judge Court and Six-Person Jury: Hearing on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93rd Cong. 5 (1973-1974) (testimony of Hon. J. Skelly Wright, Chairman, Judicial Conference Comm. on Fed. Jurisdiction).

A consensus developed that the threshold issue of determining when a three-judge court is required often "generate[ed], rather than lessen[ed], litigation," and that reducing its incidence "would increase the efficiency of our judicial system" by avoiding "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976).

b. In 1976, in response to widespread calls for reform (see Michael E. Solimine, *Congress, Ex Parte Young, and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 139-142 (2008)), Congress substantially narrowed, but did not entirely repeal, the Three-Judge Court Act. See Act of Aug. 12, 1976, Pub. L. No. 94-381, 90 Stat. 119 (28 U.S.C. § 2284).

Two changes in the present-day statute are notable in comparison with the version of the Act that prevailed for most of the twentieth century.

First, the Three-Judge Court Act no longer applies to all requests for injunctions against the enforcement of state and federal statutes on constitutional grounds. Instead, the three-judge procedure applies only "when an action is filed challenging the constitutionality of

the apportionment of congressional districts or the apportionment of any statewide legislative body" and "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a) (2012).

Congress elected to retain the procedure for cases challenging state and federal redistricting for each of the two reasons that explained the original enactment in 1910: such cases are tremendously important and therefore call for both the careful deliberation of three judges and speedy resolution by direct appeal to this Court. See, *e.g.*, S. Rep. No. 94-204, at 9 (1976); 119 Cong. Rec. 666 (1973) (statement of Sen. Burdick).

Indeed, even the most outspoken opponents of three-judge district courts, including Judge Henry Friendly, agreed that, because reapportionment cases are so exceptionally important, "[i]t is more acceptable if such cases are heard by a court whose members include adherents of more than one political party," and the speedy resolution of such challenges is "better accomplished by leaving out the court of appeals as an intermediary that has to be pierced." *Diversity Jurisdiction, Multi-Party Litig., and Choice of Law in the Fed. Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 167, 749 (1971) (testimony of Hon. Henry Friendly). Accord *id.* at 784 (testimony of Hon. J. Skelly Wright).

Second, the Act codifies the practice by which single-judge courts decide whether or not three-judge courts are "required." 28 U.S.C. § 2284(b)(1) (2012). The 1948 version of the law had likewise provided that single-judge courts should refer only those actions "required" to be heard by three-judge courts. 28 U.S.C. § 2284 (1970). See also 28 U.S.C. § 1253. But under that provision, the filing of a complaint seeking injunc-

tive relief was itself the trigger for convening a three-judge court; thus, the single judge's obligation to "immediately" convene a three-judge court commenced from the outset of the litigation, without expressly leaving room for the judge to determine whether or not three-judges were, in fact, "required." *Ibid.* Under the amended law, a plaintiff who files an action falling within the scope of Section 2284 must submit an express "request for three judges," in response to which the single judge must expressly "determine[if] three judges are not required." 28 U.S.C. § 2284(b)(1) (2012).

B. Factual background

On October 20, 2011, the Maryland General Assembly enacted Senate Bill 1, establishing the State's congressional districting plan, which Governor Martin O'Malley signed into law the same day. The plan establishes the districts for the election of Maryland's eight representatives in the United States House of Representatives and will remain in effect until after the next census in 2020. The districting plan describes each district by identifying the counties, election districts, precincts, and census block designations for the areas that are included in each district. A copy of the redistricting map is reproduced on page 23a of the petition appendix.

The redistricting plan substantially reconfigures Maryland's congressional districts. According to an analysis by *The Washington Post*, more than one-in-four Marylanders were shuffled from one district to another. See *Gerrymandered? Maryland voters to decide*, Wash. Post (Sept. 27, 2012), perma.cc/CL96-PT25 (reporting that "the plan will give at least 1.6 million people a different representative in Congress"). Several districts (including the fourth and seventh districts) feature narrow, meandering ribbons linking

together geographically, demographically, and politically disparate regions. The sixth district connects the mountainous, westernmost region of the state with densely populated suburbs of Washington, D.C. As District Judge Titus explained in his concurring opinion in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), linking these regions brings together a group of voters "who have an interest in farming, mining, tourism, paper production, and the hunting of bears * * * with voters who abhor the hunting of bears and do not know what a coal mine or paper mill even looks like." *Id.* at 906.

Maryland's plan is widely recognized as the most gerrymandered in the Nation. See Mike Maciag, *Which States, Districts Are Most Gerrymandered?*, Governing (Oct. 25, 2012), perma.cc/82PD-XBRX; Christopher Ingraham, *America's most gerrymandered congressional districts*, Wash. Post (May 15, 2014), perma.cc/WWP9-454G. Judge Paul Niemeyer aptly described Maryland's Third Congressional District as "reminiscent of a broken-winged pterodactyl, lying prostrate across the center of the State." *Fletcher*, 831 F. Supp. 2d at 902 n.5. And as one editorial put it, "the map has been sliced, diced, shuffled and shattered, making districts resemble studies in cubism." Editorial Board, *Md. redistricting maps are comic and controversial*, Wash. Post (Oct. 29, 2011), perma.cc/KF9V-JCSZ.

The result, according to the amended complaint, is an "abridgement of representational, voting, and association rights." Opp. App. 31 (¶ 5).

C. Procedural background

1. Petitioners, who are a bipartisan group of concerned Marylanders, filed a pro se complaint in the District Court for the District of Maryland, challenging the constitutionality of Maryland's redistricting plan.

As relevant here, petitioners alleged that the plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth* [v. *Jubelirer*, 541 U.S. 267 (2004)]." Opp. App. 44 (¶ 23). See also *id.* at 29 (¶ 2) (map violates "First Amendment rights of political association"); *id.* at 31 (¶ 5) ("the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association"). According to Justice Kennedy's concurrence in *Vieth*, a political gerrymander may "impose burdens and restrictions on groups or persons by reason of their views," which "would likely be a First Amendment violation, unless the State shows some compelling interest." 541 U.S. at 315.

Petitioners also expressly requested the convening of a three-judge court. Opp. App. 31 (¶ 6).

2. Judge Bredar dismissed the case without referring the matter to a three-judge court. Pet. App. 3a-21a. He "recognize[d] that some early cases appear to eschew the traditional 12(b)(6) standard in favor of one that looks to whether a plaintiff's complaint sets forth a 'substantial question.'" *Id.* at 7a. But, Judge Bredar explained, "in the present context, the 'substantial question' standard and the legal sufficiency standard are one and the same" because, "where a plaintiff's 'pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court.'" *Id.* at 7a-8a (quoting *Duckworth*, 332 F.3d at 772-773).

Judge Bredar therefore "appl[ied] the usual Rule 12(b)(6) standard in deciding th[e] motion" (Pet. App. 8a) and dismissed petitioners' First Amendment claim on the merits (*id.* at 20a-21a).

Judge Bredar was "not insensitive to Plaintiffs' contention that Maryland's districts as they are currently drawn work an unfairness" and recognized that "[i]t may well be that the 4th, 6th, 7th, and 8th congressional districts, which are at issue in this case, fail to provide 'fair and effective representation for all citizens.'" Pet. App. 19a-20a (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 565-568 (1964)). He nevertheless rejected petitioners' First Amendment claim, concluding, without citing any of this Court's precedents, that the claim "is not one for which relief can be granted." Pet. App. 21a. That is so, Judge Bredar concluded, because "nothing about the congressional districts at issue in this case affects in any proscribed way Plaintiffs' ability to participate in the political debate." *Id.* at 20a (internal quotation marks and alteration marks omitted). Petitioners "are free," he continued, "to join pre-existing political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." *Id.* at 21a (internal quotation marks omitted). On that basis, Judge Bredar dismissed the claim on the merits, refusing to convene a three-judge court. *Ibid.*

3. The court of appeals summarily affirmed (Pet. App. 1a-2a) and denied petitioners' request for rehearing and rehearing en banc (*id.* at 22a).

SUMMARY OF THE ARGUMENT

May a single-judge district court determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)? The Fourth Circuit—standing alone among the lower courts—has answered that question affirmatively, and without a word of explanation. Every relevant consideration indicates that the Fourth

Circuit's answer is wrong, and that this case should have been referred to a three-judge court.

A. 1. The statutory text provides that a three-judge district court "shall" be convened in any case presenting a constitutional challenge to congressional redistricting. Although that language is, on its face, mandatory, this Court long ago held that a single-judge court could determine that three judges are "not required" if the court lacked jurisdiction over the suit. One ground for determining that jurisdiction is lacking is that the complaint's claims are wholly insubstantial—meaning that they are "inescapably foreclosed" by this Court's precedents. That is an extremely narrow standard; when a complaint's claims are weak but arguable, the dismissal cannot be for lack of jurisdiction; rather, it entails judgment on the merits, after the court has *assumed* jurisdiction.

It was against that backdrop that Congress, in 1976, amended the Three-Judge Court Act, expressly codifying the single-judge district court's long-recognized power to "determine[] that three judges are not required." 28 U.S.C. § 2284(b)(1). Those words necessarily reflect the meaning ascribed to them by the precedents from which they were taken. And those precedents—which repeatedly recognize the difference between dismissal for want of jurisdiction and dismissal on the merits—foreclose the Fourth Circuit's approach to the question presented in *Duckworth*.

2. The Fourth Circuit's approach is also inconsistent with the statutory scheme, in two respects. To begin with, once a three-judge court has been called, Section 2284(b)(3) permits a single member of the court to decide routine matters on behalf of the panel. But it expressly forbids any single judge from deciding a request for an injunction or entering judgment on the

merits. Yet, under the *Duckworth* rule, a single-judge court may determine that "three judges are not required" when that single judge unilaterally concludes that the plaintiff has not raised a viable legal theory or is otherwise not entitled to relief. That undercuts the design of the statute, which otherwise requires injunctions and judgments on the merits to be decided by the full three-judge panel.

Second, an appeal from a decision not to convene a three-judge court must be taken to the court of appeals. But because Section 1253 vests this Court with exclusive jurisdiction to hear the merits of cases required to be heard by a court of three judges, the settled rule is that that the courts of appeals may not reach the merits in any case that they decide should have been referred to a three-judge court. That creates a jurisdictional Catch-22 in cases where the single-judge court refuses to convene a three-judge court by way of Rule 12(b)(6): In order for the court of appeals to reverse in any such case, it will necessarily have to reach the merits of the underlying claims. But by reversing on the merits, the court will paradoxically be depriving itself of jurisdiction to do just that. That makes nonsense of the jurisdictional scheme.

3. By tying jurisdiction to Rule 12(b)(6), *Duckworth* furthermore establishes the sort of complex jurisdictional test that this Court's precedents discourage. Rule 12(b)(6) permits the dismissal of arguable claims. A jurisdictional rule that, by its nature, turns on answers to debatable legal questions virtually guarantees protracted and inefficient litigation on the threshold question of which court is the right court to decide the merits of a complaint. Such uncertainty and inefficiency weighs strongly against the Fourth Circuit's approach.

4. The Fourth Circuit's approach in *Duckworth* also contradicts the statute's settled purposes. It has long been recognized that Congress enacted the three-judge court statute to ensure that particularly important cases enjoy the benefit of both careful consideration by three judges and speedy final resolution by direct appeal to this Court. Both purposes are thwarted by *Duckworth*, which allows single judges to determine the merits of such cases—often (as in this case) without especially careful reasoning—and routes appeals through the intermediate courts of appeals, which often slow final resolution by several years, especially when a case is reversed and remanded for a do-over before a three-judge court. That is not the outcome that Congress had in mind when it first passed the Three-Judge Court Act in 1910 or when it modernized the Act in 1976.

In sum, the Fourth Circuit's answer to the question presented is inconsistent with the statutory text, upsets the statutory scheme, ignores the rule against complex jurisdictional tests, and undermines the Act's settled purposes. It should be rejected.

B. The upshot is that Judge Bredar should have referred this case to a three-judge court. The only excuse for failing to do so would be a conclusion that the First Amendment claim stated in the complaint is wholly frivolous and inescapably foreclosed by this Court's precedents. It is nothing of the sort. In fact, the opposite is true: This Court's precedents lend substantial support to the First Amendment claim here. The entire action therefore should have been heard by a three-judge court.

ARGUMENT

THIS ACTION SHOULD HAVE BEEN REFERRED TO A THREE-JUDGE DISTRICT COURT

A. When the statutory requirements are otherwise satisfied, three judges are "not required" only when subject matter jurisdiction is found lacking

Section 2284(a) provides that a district court of three judges "shall" be convened when, as here, "an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or when "otherwise required by Act of Congress." 28 U.S.C. § 2284(a). When the plaintiff in a suit covered by Section 2284(a) files "a request for three judges," the single judge to whom the case is initially referred "shall, *unless he determines that three judges are not required*, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge * * * to hear and determine the action or proceeding." 28 U.S.C. § 2284(b)(1) (emphasis added).

The Fourth Circuit held, in *Duckworth* v. *State Administrative Board of Election Laws*, 332 F.3d 769, (2003), that if a plaintiff's "pleadings do not state a claim" under Rule 12(b)(6), according to the lower court, "then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-773.

That holding cannot be squared with the statute's text, which must be interpreted against the backdrop of this Court's precedents. It also offends the statutory scheme, runs afoul the rule against complex jurisdictional tests, and disserves the settled purposes underlying the Three-Judge Court Act. This Court accord-

ingly should disapprove the rule announced in *Duckworth*, vacate the judgments of the lower courts, and remand with instructions to refer the entire complaint to a three-judge district court.

1. The statutory text forbids a single-judge district court from granting a Rule 12-(b)(6) motion to dismiss

At issue in this case is the meaning of the phrase "unless he determines that three judges are not required." 28 U.S.C. § 2284(b)(1). The question, more particularly, is whether one basis for determining that "three judges are not required" is that the complaint fails to state a claim under Federal Rule of Civil Procedure 12(b)(6). It is not.

a. As always, the "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC* v. *United States*, 541 U.S. 176, 183 (2004). Here, the text of the statute clearly "identifies those situations in which the convening of a three-judge court is compulsory" (*Page* v. *Bartels*, 248 F.3d 175, 185 (3d Cir. 2001)): "A district court of three judges shall be convened when," among other things, "an action is filed challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a).

The word "shall" "'indicates a command that admits of no discretion on the part of the person instructed to carry out the directive.'" *Nat'l Ass'n of Home Builders* v. *Defenders of Wildlife*, 551 U.S. 644, 661 (2007) (quoting *Lopez* v. *Davis*, 531 U.S. 230, 241 (2001)). Thus the text of the statute ostensibly requires that any complaint challenging the constitutionality of congressional redistricting be heard by a district court of three judges.

But like most things, it's not quite that simple.

Before Congress inserted the words "unless he determines that three judges are not required" in 1976 (28 U.S.C. § 2284(b)(1) (1978)), the 1948 version of the Three-Judge Court Act had similarly provided that a single-judge court shall convene a three-judge court only when the "action or proceeding" was one "*required* by Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 2284 (1970) (emphasis added). Likewise, Section 1253 allowed for an immediate appeal to this Court only in cases "*required* * * * to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (1970) (emphasis added).

Under that predecessor statute, this Court had established in detail when three judges were "required" and "not required." As relevant here, the Court had said that "[a] three-judge court is *not required* when the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez*, 419 U.S. at 100 (emphasis added). Accord *Poresky*, 290 U.S. at 32 (the Three-Judge Court Act "does not require three judges to pass upon [the] initial question of jurisdiction").

As we have noted (*supra*, at 7), one settled basis for finding that the district court lacked jurisdiction was the determination that the federal claim was "insubstantial." *McLucas* v. *DeChamplain*, 421 U.S. 21, 28 (1975). See also, *e.g.*, *Hagans* v. *Lavine*, 415 U.S. 528, 540 (1974) (a claim can be "so insubstantial as to be beyond the jurisdiction of the District Court"). This Court accordingly held in *Bailey* that "Section 2281 does *not require* a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent." 369 U.S. at 33

(emphasis added). By 1976, that rule was beyond cavil. See *Goosby*, 409 U.S. at 518 (citing and quoting cases).[2]

The insubstantiality rule was well-developed by this Court's precedents: "A claim is insubstantial" in the jurisdictional sense "only if 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy.'" *Goosby*, 409 U.S. at 518 (quoting *Poresky*, 290 U.S. at 32). "'Constitutional insubstantiality' for this purpose has been equated with such concepts as 'essentially fictitious,' 'wholly insubstantial,' 'obviously frivolous,' and 'obviously without merit.'" *Ibid.* (citations omitted).

The use of modifiers was not gratuitous; on the contrary, "[t]he limiting words 'wholly' and 'obviously,' have cogent legal significance." *Goosby*, 409 U.S. at 518. "In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that claims are constitutionally insubstantial only if the prior decisions *inescapably render the claims frivolous*." *Ibid.* (emphasis added). Thus, as this Court observed later on, "constitutional claims will not lightly be found insubstantial for purposes of § 2281." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147-148 (1980).

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[2] Sometimes "[t]here is no sharp dichotomy * * * between jurisdictional and constitutional issues," as, for instance, with respect to standing. *Feinberg* v. *FDIC*, 522 F.2d 1335, 1342 (D.C. Cir. 1975). In such circumstances, when it is "impossible * * * to fully separate jurisdictional issues from constitutional ones," it may be appropriate for the single-judge court to refer the question of jurisdiction to the three-judge court. *Id.* at 1341.

Just as this Court's precedents made clear when single-judge courts *could* determine that three judges were not required, they also made clear when they could *not*. It was regarded as fundamental in 1976 that "failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell* v. *Hood*, 327 U.S. 678, 682 (1946). Thus, "[d]ismissal for lack of subject-matter jurisdiction because of the inadequacy of [a] federal claim is proper *only* when the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy.'" *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis added) (quoting *Oneida Indian Nation of N.Y.* v. *County of Oneida*, 414 U.S. 661, 666 (1974).

The rationale for that rule is self-evident: "'Jurisdiction is not defeated by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover.'" *Steel Co.*, 523 U.S. at 89 (quoting *Bell*, 327 U.S. at 682) (ellipses omitted). In fact, the opposite is true: A "court must *assume* jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief." *Bell*, 327 U.S. at 682 (emphasis added). Thus, the question whether the plaintiff has "fail[ed] to state a proper cause of action" is, per force, one that "the district court can decide only *after* it has assumed jurisdiction over the controversy." *Id.* at 682-684 (emphasis added).

For those reasons, "previous decisions that merely render claims of doubtful or questionable merit," even if sufficient to support dismissal under Rule 12(b)(6), cannot "render them insubstantial for the purposes of 28 U.S.C. § 2281." *Goosby*, 409 U.S. at 518. And "[o]nce

a federal court has ascertained that a plaintiff's jurisdiction-conferring claims are not 'insubstantial on their face,' 'no further consideration of the merits of the claim[s] is relevant to a determination of the court's jurisdiction of the subject matter,'" and the case must be referred to a three-judge court. *Hagans*, 415 U.S. at 542 n.10 (citations omitted) (quoting *Brotherhood of Locomotive Engineers* v. *Chicago, R.I. & P.R..*, 382 U.S. 423, 428 (1966); *Baker* v. *Carr*, 369 U.S. 186, 199 (1962)).

b. It was against that backdrop that Congress, in 1976, inserted the text at issue here: "Upon the filing of a request for three judges, the judge to whom the request is presented shall, *unless he determines that three judges are not required*, immediately notify the chief judge of the circuit" that a three-judge court should be convened. 28 U.S.C. § 2284(b)(1) (2012) (emphasis added).

The 1976 amendments must be understood as assigning the words "not required" the same meaning that they had been given by the precedents from which they were taken. When "Congress amend[s]" a statute, it is "presume[d] * * * [to do] so with full cognizance of the Court's [long-standing] interpretation of the prior statutes." *Ankenbrandt* v. *Richards*, 504 U.S. 689, 700 (1992). In using the words "not required" in Section 2284(b)(1), the 94th Congress is therefore "'presumed to [have been] aware of * * * the judicial interpretation'" of those words, and, absent "contrary indications," to have left that interpretation "undisturbed." *Marshall* v. *Marshall*, 547 U.S. 293, 307 (2006) (quoting *Ankenbrandt*, 504 U.S. at 700-701). Accord *Williams* v. *Taylor*, 529 U.S. 420, 434 (2000).

Here, there is no direction in the statutory text to give the words "not required" any meaning other than

one prevailing under this Court's precedents. The historical background thus indicates that Section 2284-(b)(1)'s text permits a single-judge court to "determine[] that three judges are not required" when it concludes that the complaint is constitutionally insubstantial,[3] but *not* when it merely fails to state a claim under Rule 12(b)(6).[4]

c. All of that spells doom for the Fourth Circuit's conclusion that "pleadings [that] do not state a claim" under Rule 12(b)(6) are "by definition * * * insubstantial" and thus "subject to dismissal by the district court without convening a three-judge court." *Duckworth*, 332 F.3d at 772-773.

There can be no mistaking the differences between a complaint that is "obviously frivolous" and a complaint that merely fails to state a claim. As this Court

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[3] We are unaware of any case in which this Court has expressly applied the substantiality prerequisite to the convocation of a three-judge court under the 1976 version of the Three-Judge Court Act. The courts of appeals, however, have uniformly recognized that insubstantiality remains a basis for refusing to convene a three-judge court. See, *e.g.*, *Kalson* v. *Paterson*, 542 F.3d 281, 287 (2d Cir. 2008); *Page* v. *Bartels*, 248 F.3d 175, 191 (3d Cir. 2001); *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998).

[4] Although this Court has cautioned against conflating merits issues with jurisdictional ones (see *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 510-513 (2006)) and "questioned" early on "[t]he accuracy of calling * * * jurisdictional" a dismissal for want of a substantial federal question (*Bell*, 327 U.S. at 683), it confirmed in *Arbaugh* that a complaint may be "dismissed for want of subject-matter jurisdiction if it * * * is 'wholly insubstantial and frivolous.'" 546 U.S. at 513 n.10 (quoting *Bell*, 327 U.S. at 682-683). In any event, the question here is one of statutory interpretation, which requires the text to be read consistent with what Congress understood the relevant words to mean at the time of enactment, including in light of this Court's then-prevailing precedents. *Ankenbrandt*, 504 U.S. at 700.

has explained in the context of 28 U.S.C. § 1915-(e)(2)(B)(i), which permits dismissals of "frivolous" *in forma pauperis* complaints, a dismissal on the ground of frivolousness is proper only when the complaint's claims are "clearly baseless," "fanciful," "fantastic," and "delusional." *Denton* v. *Hernandez*, 504 U.S. 25, 31-32 (1992). A complaint that merely "fails to state a claim under Federal Rule of Civil Procedure 12(b)(6)," is not necessarily any of those things, and, indeed, can "have 'an arguable basis in law.'" *Id.*, 504 U.S. at 31 (quoting *Neitzke* v. *Williams*, 490 U.S. 319, 327 (1989)).

Put another way, "[n]othing in Rule 12(b)(6) confines its sweep to claims of law which are obviously insupportable." *Neitzke*, 490 U.S. at 327. Thus, "[w]hen a complaint raises an arguable question of law which the district court ultimately finds is correctly resolved against the plaintiff, dismissal on Rule 12(b)(6) grounds is appropriate, but dismissal on the basis of frivolousness is not." *Id.* at 328 Cf. *Carr* v. *Tillery*, 591 F.3d 909, 917 (7th Cir. 2010) ("the dismissal of even a very weak case should be on the merits rather than because it was too weak even to engage federal jurisdiction").

Under the Fourth Circuit's approach, by contrast, there is "no material distinction" "between a complaint that 'does not state a substantial claim for relief' and the Rule 12(b)(6) standard." *Fletcher*, 831 F. Supp. 2d at 892 (quoting *Duckworth*, 332 F.3d at 773) (ellipses omitted). That unexplained conclusion ignores the legal context in which the 1976 amendments were enacted, conflating two concepts that this Court repeatedly has said are distinct.

2. *Duckworth* cannot be squared with the statutory scheme

If there were any lingering uncertainty that the Fourth Circuit's approach is inconsistent with the statute's text (and there should be none), it would be "clarified by the remainder of the statutory scheme." *United Sav. Assn. of Tex.* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp.* v. *Cartier, Inc.*, 486 U.S. 281, 291 (1988). Here, the statutory structure confirms that our reading of the statute is correct, in two independent respects.

First, permitting single-judge courts to refuse to convene three-judge courts by granting Rule 12(b)(6) motions to dismiss would undercut Section 2284(b)(3)'s express division of responsibilities between single judges and three-judge panels.

In cases covered by Section 2284, subsection (b)(3) sets aside certain tasks for single judges to perform, while reserving the most important judicial functions for the full three-judge panel. It provides, for example, that in cases heard by three-judge courts, "[a] single judge may conduct all proceedings *except the trial*." 28 U.S.C. § 2284(b)(3) (emphasis added). And as relevant here, it provides that a single judge may "enter all orders permitted by the rules of civil procedure except" that "[a] single judge shall not * * * determine any application for a preliminary or permanent injunction" or "enter judgment on the merits." *Ibid.*

To make sense of that division of responsibilities, the statute must be read to *preclude* a single judge from refusing to convene a three-judge court on

grounds that only the three-judge panel would otherwise have the authority to decide. If a single-judge court could declare that "three judges are not required" because the single judge believes the complaint is meritless (though not frivolous), then Section 2284-(b)(3)'s exclusive allocation of authority to three-judge panels to "enter judgment on the merits" would be frustrated.

Of course, "[t]he constraints imposed by § 2284-(b)(3) on a single district judge's authority to act are not triggered unless the action is one that is *required*, under the terms of § 2284(a), to be heard by a district court of three judges." *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001) (emphasis added).[5] But that is neither here nor there; a single-judge court undeniably "invade[s] the province of a three-judge court" when it "decide[s] the merits of the case, either by granting or by withholding relief." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 718 (1962). A contrary conclusion—one permitting a single-judge court to find that three judges are "not required" because the single-judge court assumed for itself the power to decide the merits of the complaint—would undermine the division of authority set forth in Section 2284(b)(3).

Thus, when read in context, "with a view to [its] place in the overall statutory scheme," (*FDA v. Brown & Williamson*, 529 U.S. 120, 133 (2000)), the phrase "unless he determines that three judges are not required" cannot be read as permitting a single-judge court to dismiss an otherwise covered complaint for failure to state a claim under Rule 12(b)(6).

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[5] Judge Bredar missed that point, concluding (without explanation) that Section 2284(b)(3)'s limitations applied regardless of whether or not he determined that three judges were "required." Pet. App. 6a.

Second, permitting single-judge courts to grant Rule 12(b)(6) motions to dismiss would make Section 2284's scheme of appellate review irrational.

It is fundamental, in light of Section 1253's assignment of jurisdiction over appeals from judgments of three-judge district courts to this Court alone, that "a court of appeals [is] precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716 (citing *Stratton*, 282 U.S. at 10). A "Court of Appeals [is] without jurisdiction to render * * * an adjudication of the merits" in such cases. *Goosby*, 409 U.S. at 522 n.8.

The *Duckworth* rule thus creates a jurisdictional Catch-22: Permitting a single-judge court to refuse to convene a three-judge court on Rule 12(b)(6) grounds will necessarily *require* the court of appeals to review the merits of the case, even when the court ultimately determines that the dismissal was erroneous and a three-judge court should have been convened. In all such cases, therefore, the court of appeals' decision on the merits (*qua* decision on jurisdiction) will paradoxically deprive it of jurisdiction to enter a decision on the merits. That makes no sense.

When a proposed interpretation of a statutory provision "would be inconsistent with—in fact, would overthrow—the Act's structure and design," that interpretation must be rejected. *Util. Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2442 (2014). Just so here.

3. *Duckworth* offends the rule favoring clear jurisdictional tests

The jurisdictional complications created by the *Duckworth* rule do more than offend the statutory structure—they also ignore this Court's "rule favoring clear boundaries in the interpretation of jurisdictional

statutes." *Direct Mktg. Ass'n* v. *Brohl*, 135 S. Ct. 1124, 1131 (2015) (citing *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)).

Section 2284 is a jurisdictional statute: Single-judge district courts "lack jurisdiction to decide the merits of * * * question[s that] properly belong[] before a three-judge district court." *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998) (citing *Goosby*, 409 U.S. at 522 n.8). In addition to defining the jurisdictional lines between single- and three-judge courts, the statute also delineates the bounds of this Court's mandatory jurisdiction under Section 1253, for if the case is "not one 'required * * * to be heard and determined by a district court of three judges,'" within the meaning of Section 1253, "[it] cannot be brought here on direct appeal." *Bailey*, 369 U.S. at 34.

As this Court knows well, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp.*, 559 U.S. at 94 (citing *Sisson* v. *Ruby*, 497 U.S. 358, 375 (1990) (Scalia, J., concurring in judgment)). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Ibid.* "Judicial resources too are at stake" because "[c]ourts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it." *Ibid.* (citing *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 514 (2006)). "So courts benefit from straightforward rules under which they can readily assure themselves of their power to hear a case." *Ibid.* (citing same).

By tying jurisdiction to Rule 12(b)(6), *Duckworth* establishes just the kind of "complex jurisdictional test" that this Court's precedents discourage. The frivolousness standard is relatively clear, turning on

the existence of Supreme Court precedents that inescapably foreclose the action. See *Carr*, 591 F.3d at 917 ("as a practical matter," the insubstantiality test requires that it be "clear beyond any reasonable doubt that a case doesn't belong in federal court"). That is a clear standard that allows the lower courts to "readily assure themselves of their power to hear a case." *Hertz Corp.*, 559 U.S. at 94.

The Rule 12(b)(6) standard, by contrast, permits the dismissal of claims that "have 'an arguable basis in law.'" *Denton*, 504 U.S. at 31 (quoting *Neitzke*, 490 U.S. at 327). The dismissal under 12(b)(6) of a complaint founded on a debatable legal theory hardly gives satisfactory assurance concerning jurisdiction. On the contrary, a jurisdictional rule that, as a matter of course, turns on answers to debatable legal questions virtually guarantees protracted litigation on the threshold question of "which court is the right court to decide" the merits of petitioners' complaint. *Hertz Corp.*, 559 U.S. at 94.

4. *Duckworth* contradicts the statute's settled purposes

The long-recognized purposes underlying the Three-Judge Court Act provide yet further reason to reject the *Duckworth* rule. Courts "cannot interpret federal statutes to negate their own stated purposes." *King* v. *Burwell*, No. 14-114, 2015 WL 2473448, at *12 (U.S. June 25, 2015) (quoting *N.Y. State Dep't of Social Servs.* v. *Dublino*, 413 U.S. 405, 419-420 (1973). That is just what the *Duckworth* rule does.

As we have explained (*supra*, at 4-5, 9), there are two well-recognized purposes underlying the present-day Three-Judge Court Act.

a. Three-judge district courts "allow a more authoritative determination and less opportunity for indivi-

dual predilection in sensitive and politically emotional areas." *Swift*, 382 U.S. at 119. "However much integrity, strength and good-will [single district judges] may have, they are—like all of us—affected by their environment in a host of unconscious and half-conscious ways." *Hearing on S. 271 and H.R. 8285*, at 123 (testimony of Prof. Anthony G. Amsterdam). "Statutory three-judge district courts are considerably more resistant to these local influences than [are] single district judge[s]" and ensure a "considered decision-making process" that acts as a check on "local pressures" and allows for "share[d] responsibility." *Ibid.* The evidence is thus clear that, with the Three-Judge Court Act, Congress "sought to assure more weight and greater deliberation by not leaving the fate of [important] litigation to a single judge." *Phillips* v. *United States*, 312 U.S. 246, 250 (1941). Permitting single judges to dismiss reapportionment cases on the merits under Rule 12(b)(6) is at cross-purposes with that goal.[6]

To be sure, a key rationale for requiring three judges was concern for the granting, not denying, of relief, driven by the belief that "no one Federal judge [should have the power to] *set aside* what the Congress has done or what the State legislature has done." *Hearings on S. 1876*, at 791 (testimony of Judge Wright) (emphasis added). But there is no reason to think that the same rationale does not apply inversely as well.

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[6] This purpose is confirmed by other enactments requiring litigation before three-judge district courts. See, *e.g.*, H.R. Rep. No. 88-914, at 2490-91 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391 (concerning three-judge court review under the Voting Rights Act, noting that "[t]he balance and broad range of views that three judges can bring to bear upon a voting case should assure fewer instances of delay and a greater willingness to safeguard the individual's right to vote").

"Allegations of unconstitutional bias in apportionment are most serious claims" (*Vieth*, 541 U.S. at 311-312 (Kennedy, J., concurring)), and "[q]uestions regarding the legitimacy of the state legislative apportionment (and particularly its review by the federal courts) are highly sensitive matters" (*Page*, 248 F.3d at 190). No single judge should have the authority to scuttle a meritorious constitutional challenge involving such important claims. That much is confirmed by Congress's retention of the three-judge court procedure even in an era when "the three-judge district court, as compared to single district judges, [had become] *more* favorable to civil rights plaintiffs overall." Solimine, *Fate*, at 129 (emphasis added).

b. Of course, plaintiffs in such cases always have the benefit of appellate review before three-judge panels of the courts of appeals. But that only highlights the second statutory purpose undermined by the Fourth Circuit's answer to the question presented: "ensuring this Court's swift review." *Gonzalez*, 419 U.S. at 98.

This Court repeatedly has recognized that "the statute 'authorizes direct review by this Court * * * as a means of accelerating a final determination on the merits.'" *Gonzalez*, 419 U.S. at 96 (quoting *Swift*, 382 U.S. at 119). Accord, *e.g.*, *FEC* v. *Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985) (the three-judge court procedure ensures "expedited review, and direct appeal to this Court" in cases that are "likely to be of great importance"). As Judge Friendly explained in his testimony before the 92d Congress, the speedy resolution of such challenges is "better accomplished by leaving out the court of appeals as an

intermediary that has to be pierced." *Hearings on S. 1876*, at 749 (1971).[7]

Yet a core concern prompting enactment of the present-day statute was the widespread view that the process of determining when a three-judge court is required undercut "the efficiency of our judicial system" by producing "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976). *Duckworth* exacerbates that problem exponentially.

When a single judge grants a Rule 12(b)(6) motion to dismiss (as in this case), the result is likely to be years of litigation before the plaintiffs receive a final answer just on the threshold question of whether they are entitled to a hearing before a three-judge court. Rather than appealing immediately to this Court pursuant to Section 1253, the plaintiffs in such a case would have had to bring their appeal before the court of appeals—a process that, by itself, may add two or three years. See *Frequently Asked Questions*, U.S. Court of Appeals for the Ninth Circuit, perma.cc/4XWU-RZVK (average time from the notice of appeal to oral argument is 12-20 months, and from argument to decision, 3-12 months).

If the court of appeals affirms, briefing and decision on a petition for certiorari would take at least six months longer, to say nothing of the additional time required if certiorari is granted. And if the court of

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[7] This second purpose is likewise confirmed by more recent legislation. See, *e.g.*, 147 Cong. Rec. 5145 (2001) (statement of Sen. Hatch) (concerning three-judge court review under the Bipartisan Campaign Reform Act, arguing that there should be a "prompt and definite determination of the constitutionality of many of the bill's controversial provisions" and that it "is imperative that we afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible").

appeals or this Court reverses, the case goes back down to a three-judge court for the litigation to "start[] all over again." *Hearing on S. 271 and H.R. 8285*, at 5 (testimony of Hon. J. Skelly Wright). Only once the three-judge issues a subsequent decision on the merits would a direct merits appeal to this Court become available. It was precisely the point of the 1976 amendments to avoid such "duplicative" appeals. S. Rep. No. 94-204, at 7 (1976).

As Congress recognized when it preserved three-judge court review for redistricting cases, those concerns carry special weight in cases like this one, where delay may also frustrate the underlying purpose of the lawsuit. "[A] court order permitting a man to vote is a hollow victory, when the order is handed down after the election has been held and the votes counted." 110 Cong. Rec. 1536 (1964) (statement of Congressman McCulloch). Indeed, even in some cases where the decision comes down before the election, it may be too late for effective relief. See *Reynolds* v. *Sims*, 377 U.S. 533, 585 (1964).

Circumstances are not much better when a single judge *denies* a 12(b)(6) motion to dismiss. Once the case is referred to a three-judge court, the allocation of responsibility established by Section 2284(b)(3) kicks in, including the rule that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment" (28 U.S.C. § 2284(b)(3)) and that only the three-judge panel may "decide the merits of the case, either by granting or by withholding relief" (*Idlewild*, 370 U.S. at 715).

Thus, the first step that a defendant ordinarily will take in any case referred to a three-judge district court after the single-judge court denies the first motion to dismiss is to move *again* under Rule 12(b)(6), which, as

a decision on the merits, must be decided by the three-judge panel. That is just what happened in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). Although the three-judge court ruled relatively quickly on the second motion to dismiss, such duplicative litigation serves no useful purpose and guarantees pointless delay before entry of final judgment.

And the likelihood that the defendants' Rule 12-(b)(6) motion will be reargued and redecided introduces yet another complication: Under *Duckworth*, if the three-judge court overrules the single-judge court and grants the motion to dismiss, the upshot is that the three-judge court should not have been convened to begin with. From a decision of that sort, which requires the "the three-judge court [to] dissolve[] itself for want of jurisdiction" and remand to the single-judge court, "an appeal lies to the appropriate Court of Appeals and not to this Court." *Mengelkoch* v. *Indus. Welfare Comm'n*, 393 U.S. 83, 83-84 (1968).

Thus if *Duckworth* were the correct legal rule, this Court would have lacked jurisdiction to decide the merits in *Arizona State Legislature* v. *Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), and would lack jurisdiction to decide the merits in *Evenwel* v. *Abbott* (No. 14-940) this Term, because in each of those cases, the three-judge district court granted the defendants' motion to dismiss. Yet it should go without saying that those are exactly the kind of important, time-sensitive cases requiring prompt resolution by this Court.

In sum, the *Duckworth* rule is insupportable. It is out of line the statute's text, structure, and purposes, and with nearly a century of this Court's precedents. It must be rejected.

B. A three-judge district court was required in this case

Because the *Duckworth* rule is wrong and petitioners have presented a non-frivolous First Amendment claim, the complaint should have been referred to a three-judge court.

1. There is little doubt that a political gerrymander can violate the Constitution. As this Court has explained, "each political group in a State should have the same chance to elect representatives of its choice as any other political group," and "'[d]iluting the weight of votes because of place of residence impairs basic constitutional rights.'" *Davis* v. *Bandemer*, 478 U.S. 109, 124 (1986) (plurality) (quoting *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964)).[8] More broadly, the Elections Clause is "'a grant of authority to issue procedural regulations, and not * * * a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.'" *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995)).

Among the constitutional constraints that lawmakers may not evade are those imposed by the First Amendment. "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976). Thus "First Amendment concerns arise where a State enacts a law that has the purpose and effect of sub-

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[8] The plurality in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), did not disagree that "severe partisan gerrymanders [can] violate the Constitution" or "an excessive injection of politics [in redistricting] is unlawful." *Id.* at 292-293 (emphasis omitted). It concluded, instead, that "it is [not] for the courts to say when a violation has occurred." *Id.* at 292.

jecting a group of voters or their party to disfavored treatment by reason of their views." *Vieth* v. *Jubelirer*, 541 U.S. 267, 314 (2004) (Kennedy, J., concurring in the judgment).[9]

That observation finds substantial support in this Court's precedents. If a burden were imposed on citizens "because of [their] constitutionally protected speech or associations," this Court has said, "[their] exercise of those freedoms would in effect be penalized and inhibited." *Elrod*, 427 U.S. at 359. Thus, "[a] burden that falls unequally on [particular] political parties, * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983).

It follows that citizens enjoy a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "voting history," "association with a political party," or "expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in judgment) (citing *Elrod*, 427 U.S. at 347 and *Cal. Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)). "In the [specific] context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights." *Ibid.* And "[i]f a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their

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[9] Justice Kennedy's concurring opinion in *Veith* must be understood as controlling under *Marks* v. *United States*, 430 U.S. 188 (1977). See *Alperin* v. *Vatican Bank*, 410 F.3d 532, 552 n.13 (9th Cir. 2005); *Perez* v. *Perry*, 26 F. Supp. 3d 612, 623 n.6 (W.D. Tex. 2014); *Ala. Leg. Black Caucus* v. *Alabama*, 988 F. Supp .2d 1285, 1295 (M.D. Ala. 2013). Judge Bredar largely ignored this point, treating the plurality opinion as binding and describing it as having "reversed *Bandemer*." Pet. App. 15a.

views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Id.* at 315.

The federal courts are well equipped with a range of manageable standards to enforce that commonsense rule. This Court's First Amendment retaliation doctrine, for example, maps naturally onto the problem of political gerrymandering, which itself works as a kind of retaliation for citizens' voting histories and political-party affiliations.

According to the familiar *Pickering* balancing test, courts must "arrive at a balance between the interests" of individuals in the exercise of core First Amendment rights and of the State in the performance of its necessary public functions. *Pickering* v. *Bd. of Educ.*, 391 U.S. 563, 568 (1968).[10] Such a balancing test gives leeway to recognize that the "government must play an active role in structuring elections," and "[e]lection laws will invariably impose some burden upon individual voters." *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992). Cf. *Gaffney* v. *Cummings*, 412 U.S. 735, 752 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it.").

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[10] The States' role with respect to federal elections calls for the exercise not of their reserved power under the Tenth Amendment, but of the limited grant of authority under Article I, Section 4 of the Constitution. Whereas Section 2 of that Article mandates that representatives be elected directly "by the People of the several States," Section 4 assigns the States the limited responsibility to establish procedural regulations for holding those elections. It is not a "source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (*U.S. Term Limits*, 514 U.S. at 833-834), including the First Amendment.

But by analogy, it also requires that, when citizens' voting histories and party affiliations are shown to be a "substantial or motivating factor" in the drawing of particular district lines (*Board of Cnty. Comm'rs* v. *Umbehr*, 518 U.S. 668, 675 (1996)), the State must come forward with "an adequate justification" for the lines it has drawn (*Garcetti* v. *Ceballos*, 547 U.S. 410, 418 (2006)). After all, "'[d]iluting the weight of votes because of place of residence'" to ensure that an identifiable political group has "an insufficient chance to elect a representative of its choice" surely "impair[s] basic constitutional rights" (*Bandemer*, 478 U.S. at 124) and demands an explanation that comports with the Constitution.[11] Cf. *League of Women Voters of Florida* v. *Detzner*, No. SC14-1905, 2015 WL 4130852, at *2 (Fla. July 9, 2015) ("Once a direct violation of the Florida Constitution's prohibition on partisan intent in redistricting was found, the burden should have shifted to the Legislature to justify its decisions in drawing the congressional district lines.").

2. Just such a theory of First Amendment injury is alleged in the pro se complaint in this case. Petitioners

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[11] A *Pickering*-balancing approach bears some resemblance to this Court's approach to ballot-access cases, which "focus[es] on the degree to which the challenged restrictions operate" to "unfairly or unnecessarily burden[] the 'availability of political opportunity.'" *Clements* v. *Fashing*, 457 U.S. 957, 964 (1982) (quoting *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974)). Regardless of which test applies, a sliding-scale approach avoids the dilemma that, "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick*, 504 U.S. at 433. Contra *Vieth*, 541 U.S. at 294 (plurality) ("[A] First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting.").

claim specifically that Maryland's redistricting plan burdens their First Amendment rights "along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." Opp. App. 44 (¶ 23). Thus, "the structure and composition of the abridged sections" of various districts "constitute infringement of First Amendment rights of political association." *Id.* at 31 (¶ 5).

This Court has warned that "constitutional claims will not lightly be found insubstantial for purposes of § 2281." *Washington* v. *Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 147-148 (1980). Thus, "claims are constitutionally insubstantial only if the prior decisions *inescapably render the claims frivolous*; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281." *Goosby*, 409 U.S. at 508 (emphasis added). Far from foreclosing petitioners' First Amendment claim, this Court's precedents lend powerful support to it. At a bare minimum, the claim's viability is arguable.

Neither Judge Bredar nor the court of appeals cited a single decision of this Court suggesting otherwise. That being so, Judge Bredar erred by refusing to call for a three-judge court.

Because Section 2284(b) applies to the entire "action" and not individual claims, moreover, a three-judge court was required to consider "all of [petitioner]s' claims." *Lake Carriers' Ass'n* v. *MacMullan*, 406 U.S. 498, 504 n.5 (1972). See Petn. 29 n.12; accord *Page*, 248 F.3d at 187-188 ("the entire case, and not just [certain] claims, must be heard by a three-judge court"). The Court accordingly should vacate the judgments of both the court of appeals and the district court and remand with instructions to convene a three-judge court to consider petitioners' entire complaint.

CONCLUSION

The judgments of the court of appeals and district court should be vacated for lack of jurisdiction, and the case should be remanded with instructions to refer the complaint to a three-judge district court.

Respectfully submitted.

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No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,

Petitioners,

v.

DAVID J. MCMANUS, JR., *et al.*,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

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QUESTION PRESENTED

Under a district judge's authority to "determine[] that three judges are not required" to hear a reapportionment challenge under 28 U.S.C. § 2284, is a single judge permitted to dismiss the challenge where it is legally insufficient to state any claim for relief under Federal Rule of Civil Procedure 12(b)(6)?

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STATEMENT

In *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), the Fourth Circuit held that, in a reapportionment challenge stating no plausible claim for relief, a single district judge can determine that three judges are not required to be convened under 28 U.S.C. § 2284. That interpretation accords with the plain text of the statute, as amended by Congress in 1976; reflects congressional purposes in enacting and later amending the three-judge-court procedure; minimizes the burden on the lower federal courts; and reduces the number of cases that bypass the traditional appellate channels through a direct appeal to this Court. This Court should uphold the Fourth Circuit's interpretation and affirm its decision in this case.

Statutory Background

In 1910, Congress enacted the Three-Judge-Court Act (the "Act") in response to this Court's decision in *Ex parte Young*, 209 U.S. 123 (1908), which had allowed single federal district court judges to enjoin state statutes and thereby paralyze the operations of state government. *See* 45 Cong. Rec. 7256 (1910) (statement of Sen. Overton). "[T]he states, experimenting with a variety of novel regulatory and tax measures to cope with the needs of the new industrial world, were encountering stubborn obstacles in the persons of federal judges who insisted on reading their own economic theories into the due process and commerce clauses." David P. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 5 (1964). Congress intervened to ensure that only a special three-judge district court could issue a

preliminary injunction suspending a state statute as unconstitutional. *See* Act of June 18, 1910 ch. 309, § 17, 36 Stat. 557. Thus, the purpose of the Three-Judge-Court Act is to provide "procedural protection" for the States "against an improvident state-wide doom by a federal court of a state's legislative policy." *Phillips v. United States*, 312 U.S. 246, 251 (1941).

The 1910 Act provided that "no interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a state shall be issued" on "the ground of the unconstitutionality of such statute unless the application for the same shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court of the United States or a circuit judge and unless the majority of said three judges shall concur in granting such application." Act of June 18, 1910 ch. 309, § 17. After the application for a preliminary injunction was "presented" to a judge, the judge was required to "immediately call to his assistance" two other judges "to hear and determine the application." *Id.* The Act also allowed for "an appeal [to] be taken directly to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case." *Id.*

This "procedural device," *Phillips*, 312 U.S. at 250, was later extended to cover requests for preliminary injunctions on constitutional grounds against state administrative agency orders and federal statutes. *See* Act of Mar. 4, 1913 ch. 160, 37 Stat. 1013 (state administrative orders); Act of Aug. 24, 1937 ch. 754, 50 Stat. 752 (federal statutes). As with the original

enactment, the purpose of these amendments was to "prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 154 (1963).

Congress consolidated and recodified the various three-judge-court statutes in 1948. *See* Act of June 25, 1948 ch. 646, 62 Stat. 869, 928 (codified at 28 U.S.C. §§ 2281-2284). By that time, the Act applied to all requests for both preliminary and permanent injunctions against state and federal statutes on constitutional grounds. *Id.* The predecessor of the provision at issue in this case, § 2284, stated: "In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges [t]he district judge to whom the application for injunction or other relief is presented shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." *Id.*

By 1976, "the burden of three-judge-court cases" was "causing a considerable strain on the workload of Federal judges," clogging this Court's appellate docket, and preventing it from controlling its own caseload. S. Rep. No. 94-204 (1975), at 3-4. That year, Congress enacted reform legislation that significantly altered the three-judge-court procedure. *See* Act of Aug. 12, 1976, Pub. L. 94-381, § 3, 90 Stat. 1119. First, Congress amended the Act to limit its applicability to cases in which a party submits a "request for three judges" and granted a single district judge the express authority to examine the party's request and "determine that three judges are not required." 28 U.S.C. § 2284(b)(1).

Second, Congress "eliminat[ed] the requirement for special three-judge courts in cases seeking to enjoin the enforcement of State or Federal laws on the grounds of unconstitutionality." S. Rep. No. 94-204, at 1.

Congress retained the three-judge court only "when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." 28 U.S.C. § 2284(a). As explained in more detail below, Congress believed that apportionment cases "continue[d] to need the [same] protection that three-judge district courts were originally designed to give," namely, that "no one Federal judge set aside what the Congress has done or what the State legislature has done." *Admiralty Jurisdiction, United States as a Party, General Federal Question Jurisdiction and Three-Judge Courts: Hearing on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 635, 791 (1972) ("1972 Hearings") (testimony of Judge Skelly Wright).

The current version of 28 U.S.C. § 2284 provides in pertinent part:

> (a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.
>
> (b) In any action required to be heard and determined by a district court of three judges

> under subsection (a) of this section, the composition and procedure of the court shall be as follows:
>
> (1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge.

Maryland's 2011 Congressional Redistricting

On October 20, 2011, the Maryland General Assembly enacted, and the Governor signed into law, a new Congressional districting plan based on the results of the 2010 decennial census. 2011 Md. Laws, Spec. Sess. ch. 1, codified as Md. Code Ann., Elec. Law §§ 8-701—8-709 (2014 Supp.). The plan divides Maryland into 8 Congressional districts with populations as equal as mathematically possible: 7 districts have exactly the same population, and the 8th district has one additional voter because the State's population as determined by the census is not evenly divisible by 8.

Within months after the plan's enactment, this Court considered a challenge to Maryland's reapportioned Congressional districts. In *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), the plaintiffs challenged the 2011 districting plan on grounds that included allegations of racial gerrymandering and partisan gerrymandering. On December 23, 2011, a three-judge district court rejected all of the plaintiffs' claims and unanimously upheld the constitutionality of the 2011 districting plan. This

Court summarily affirmed on June 25, 2012. 133 S. Ct. 29 (2012). During that same period, the lower federal courts rejected two other challenges to the 2011 districting plan. *Gorrell v. O'Malley*, Civil No. WDQ–11–2975, 2012 WL 226919 (D. Md. Jan. 19, 2012), *aff'd*, 474 Fed. App'x 150 (July 12, 2012); *Olson v. O'Malley*, Civil No. WDQ–12–0240, 2012 WL 764421 (D. Md. Mar. 6, 2012).

The Petitioners' 2013 Lawsuit

On November 5, 2013, more than 15 months after this Court issued its decision summarily affirming the result in *Fletcher v. Lamone* and a year after voters in the redrawn districts elected their representatives to Congress, the petitioners filed this suit for injunctive relief. Their complaint asserted three constitutional claims, all arising from the petitioners' objection to "the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts." Opp. App.[1] 2 ¶ 2; 29 ¶ 2.

The complaint began by acknowledging that a three-judge panel had "previously found the Congressional Districts established by the General Assembly of Maryland not to be a 'partisan gerrymander' (*Fletcher v. Lamone*) in violation of the 14th Amendment." *Id.* The complaint then asserted that rights of "representation" under Article I, § 2 and

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[1] Pursuant to Rule 26.8, with the Court's permission, the parties have not filed a Joint Appendix. "Opp. App." refers to the appendix to the Brief in Opposition to Certiorari, "Pet. App." refers to the appendix to the Petition for a Writ of Certiorari, and "Resp. Br. App." refers to the appendix to this brief.

the First and Fourteenth Amendments of the Constitution were denied to residents of certain districts. *Id.* As the applicable "standard [the petitioners] propose[d] for this case," the complaint advocated "a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity." Opp. App. 15 ¶ 21; 42 ¶ 21. Under the proposed standard, "minimal representational rights" require the "presence of either (1) geographic or (2) demographic/political commonality—i.e., real or de-facto contiguity OR similarity in the demographic/partisan composition of non-contiguous (including essentially or de-facto non-contiguous) segments." Opp. App. 3 ¶ 3; 30 ¶ 3 (emphasis in original).

The complaint conceded that "the enacted districts are technically contiguous" but contended that "[i]f there is an actual or perceived requirement for the districts to be technically contiguous, then it follows that such districts must be de-facto contiguous as well – i.e., not connected through just a narrow ribbon or orifice. . " Opp. App. 19 ¶ 25; 46 ¶ 25. The complaint acknowledged the lack of any "Constitutional or statutory mandate" for the claimed contiguity requirements, *id.* 17 ¶ 24(b); 44 ¶ 24(b), and recognized that what it termed "non-contiguous districts do not inherently constitute impermissible abridgement of voting and representational rights," *id.* 16 ¶ 22; 43 ¶ 22. The complaint nonetheless asserted that an "impermissible abridgement" results when "*de facto*" noncontiguity is "combined with disparity in demographics," *id.* (emphasis in original), or, rather, disparity in "political views and the demographic factors that shape them," *id.* The "demographic

factors" petitioners advocated as appropriate indicators of demographic "contiguity" included race, ethnicity, and socioeconomic status. *Id.* 21 ¶ 29; 48 ¶ 29.

According to the complaint, the use of "narrow ribbons" and "orifices" to join "non-contiguous" areas is permissible if the result is to create a district with greater "similarity of political views" and other "demographic factors," Opp. App. 16 ¶ 22; 43 ¶ 11 22, but another district with an identical geographic configuration or shape would run afoul of the Constitution if it linked areas with "demographically discordant" populations, *id.*, meaning groups of persons who are "socioeconomically, demographically, and politically inconsistent" with each other, *id.* 6 ¶ 11; 33 ¶ 11.

Although the complaint alleged that an "abridgement" caused by "the design and demographics" of four of the districts (the 4th, 6th, 7th and 8th districts) "impacts only areas with highly Republican voting history," Opp. App. 17 ¶ 23; 44 ¶ 23, the petitioners insisted that "the focus of [their] claim is not so much that the State incorporated too much focus on impermissible partisan gerrymandering – but rather that the State incorporated too little focus on affording adequate representation to voters in the abridged sections ," *id.* 3 ¶ 2; 30 ¶ 2.

Attached to the complaint were exhibits that included 6 districting plans, designated as Options A through E, which the petitioners proposed as potential remedies that would implement the districting concepts advocated in the complaint. Opp. App. 56. As indicated by the district population table appearing to the left of each proposed alternative map, the plans

petitioners offered had districts deviating from the ideal equal population by as many as 760 persons, Opp. App. 56 (Ex. 11, Option A, Exhibit 15, Option D, Exhibit 16, Option E), and population variances between districts of as many as 1,103 persons, Opp. App. 56 (Ex. 11, Option A). Unlike Maryland's enacted plan, which achieved the maximum equality of district population mathematically possible, none of the district plans proposed by the petitioners purported to achieve the "precise mathematical equality" that this Court has demanded of Congressional districts. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964).

After filing their initial complaint, the petitioners requested and were granted leave to file an amended complaint. Opp. App. 28. The amended complaint added a "Supplemental Request for Relief," which unlike the petitioners' "Primary requested relief," Opp. App. 51-53 ¶¶ 34, 35, advocated "less deference to the legislature's intent," *id.* 53 ¶ 36. The Supplemental Request for Relief specifically asked the district court, as an alternative, to combine "the small sections of the 6th, 8th, and 7th districts," which "are predominantly Republican in voting history," thereby effectively creating a statewide map with "6 Democratic and 2 Republican districts." *Id.* 53 ¶ 36.

The District Court's Decision

The defendants moved to dismiss the complaint. Invoking the statutory authority of a single district judge in a Congressional redistricting challenge to "determine[] that three judges are not required," Pet. App. 6a (quoting 28 U.S.C. § 2284(b)(1)), the district court followed Fourth Circuit precedent holding that

"the single judge may grant a defendant's motion to dismiss under Rule 12(b)(6) where a plaintiff's pleadings fail to state a claim for which relief can be granted," Pet. App. 6a (citing *Duckworth*, 332 F.3d 769). The district judge then proceeded to "evaluate [the motion to dismiss] under the usual Rule 12(b)(6) standard" to test "the legal sufficiency of [the] complaint." Pet. App. 7a (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007); *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999)). On the basis of that evaluation, the district court determined that the amended complaint should be dismissed in its entirety. On April 8, 2014, the district court dismissed the complaint.

The district court liberally construed the amended complaint to have asserted two claims or categories of claims: one under Article I, § 2 and the Fourteenth Amendment alleging that "the structure and composition of the 4th, 6th, 7th, and 8th districts constitute impermissible abridgment of representational and voting rights," Pet. App. 8a-9a, and another under the First Amendment alleging that "'the intentional structure and composition of the challenged districts, . aggravated by the operation of Maryland's closed primary election system,' infringes upon their First Amendment rights as Republican voters," *id.* at 9a (citation omitted).

The district court observed that the petitioners' first claim, under Article I, § 2 and the Fourteenth Amendment, was "in essence, a claim of political gerrymandering," Pet. App. 14a, and the Court found this claim to be precluded for two reasons: (1) this

Court has held that a partisan gerrymandering claim is unavailable in the absence of "'judicially discernible and manageable standards for adjudicating'" such claims, *id.* 15a (quoting *Vieth v. Jubilier*, 541 U.S. 267, 281 (2004)), and (2) "the standard Plaintiffs propose is, in substance, markedly similar to tests that have already been rejected by the courts," *id.* 18a (citing *Vieth*, 541 U.S. at 308-09 (Kennedy, J., concurring) ("[E]ven those criteria that might seem promising at the outset (e.g., contiguity and compactness) are not altogether sound as independent judicial standards for measuring a burden on representational rights. They cannot promise political neutrality when used as the basis for relief.")). *See also* Pet. App. 18a (citing *Radogno v. Illinois State Bd. of Elections*, No. 1:11–cv–04884, 2011 WL 5868225, at *2-*3 (N.D. Ill. Nov. 22, 2011) (reviewing seven "standards [for partisan gerrymandering] the Supreme Court has rejected")). Given this lack of "'judicially discoverable and manageable standards,'" the district court concluded that the first category of the petitioners' claims presents "a nonjusticiable political question" requiring dismissal. Pet. App. 20a (quoting *Vieth*, 541 U.S. at 277-81; citing *Baker v. Carr*, 369 U.S. 186, 217 (1962); *League of United Latin American Citizens ("LULAC") v. Perry*, 548 U.S. 399, 423 (2006)).

The district court determined that precedent also barred the petitioners' second claim under the First Amendment, a claim that is similar to those claims asserted and rejected in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, 781 F. Supp. 394 (D. Md. 1991), *aff'd*, 504 U.S. 938 (1992), *rehearing denied*, 505 U.S. 1230 (1992); and in *Duckworth v. State Board of*

Elections, 213 F. Supp. 2d 543, 557-58 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003). The district court observed that, just as in those cases, "'nothing [about the congressional districts at issue in this case] affects in any proscribed way [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.'" Pet. App. 20a-21a (quoting *Duckworth*, 213 F. Supp. 2d at 557-58; brackets in original (quoting *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F Supp. at 401)).

Six months later, on October 7, 2014, the court of appeals affirmed in an unpublished per curiam decision, Pet. App. 1a-2a, and subsequently denied the petitioners' request for rehearing and rehearing en banc, *id.* at 22a.

SUMMARY OF ARGUMENT

1. In 1976, Congress enacted sweeping changes to 28 U.S.C. § 2284, making clear that the statute does not impose a jurisdictional limit on the power of a single district judge to decide an apportionment claim. "The best evidence of [Congress's] purpose is the statutory text ," *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98 (1991), and the plain language of 28 U.S.C. § 2284 does not prohibit a single district judge from dismissing on the merits a reapportionment challenge that fails to state any claim for relief. Moreover, in this respect, the Fourth Circuit's interpretation of the statute furthers Congress's singular purpose in enacting the three-judge-court

procedure, while also minimizing the burden on the federal courts. This Court should adopt this understanding of the statute.

a. The 1976 amendments to § 2284 established, unambiguously, that the three-judge-court statute is a purely procedural device that does not impose a jurisdictional requirement on the district courts. The statutory text provided, for the first time, that the three-judge-court procedure is triggered only "upon the filing of a request for three judges" by the petitioner or by the respondent State. Because the procedure can be waived, the statute does not require that the district court convene a three-judge court to decide the merits of every case. Moreover, although Congress could have easily done so, it did not prescribe that district court judges employ an "insubstantiality" standard, which was used to test jurisdiction under the pre-1976 statute, when deciding whether a three-judge court was "required." There is no reason to employ the insubstantiality test, which is used to decide the jurisdictional limits of a federal court, when the determination about whether the case must be heard by one judge or three is not a jurisdictional one.

b. The Rule 12(b)(6) standard, which applies to all civil actions and which single district judges employ on a daily basis, best serves the purposes of the three-judge-court statute. As this Court has explained, "Congress established the three-judge-court apparatus for one reason: to save state statutes from improvident doom, on constitutional grounds, at the hands of a single federal district court." *Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 97 (1974). The Act ensured careful deliberation by a three-judge

court and prompt review in this Court, not to grant special rights to plaintiffs with meritless claims, but "so that *the states* shall be put to the least possible inconvenience in the administration of their laws." *Mayo v. Lakeland Highlands Canning Co.*, 309 U.S. 310, 319 (1940) (emphasis added). Because the text of the statute does not compel this Court to adopt an insubstantiality test, this Court should instead adopt the standard that district court judges routinely apply and that best effectuates the congressional purpose of the Three-Judge-Court Act.

It was this purpose that motivated Congress to retain the apparatus for apportionment suits when eliminating the procedural device in most other cases. Although Congress sought to alleviate the burden on the judiciary caused by three-judge-court cases, it determined that three-judge courts were still necessary to protect the States in apportionment cases because federal district courts had recently made controversial decisions threatening state sovereignty in that area. There is no risk that a rule permitting a single judge to dismiss a meritless claim under Rule 12(b)(6) will interfere with the sovereignty of the States; on the contrary, such a rule fully supports that congressional purpose. Moreover, permitting dismissal by a single judge under Rule 12(b)(6) reduces the burden on the federal judiciary, another goal of Congress's 1976 amendments, by preventing lower courts from having to empanel three-judge courts in meritless cases and by relieving this Court of the obligation to hear those cases on direct appeal.

2. In any event, even if this Court adopts the insubstantiality test as it existed prior to 1976, the

district court in this case was correct to dismiss the complaint without impaneling a three-judge court because the petitioners' claims are indeed insubstantial. All of the petitioners' claims are grounded in the same allegation that Maryland's districts are not sufficiently contiguous, and this Court has specifically rejected the notion that a district's shape or lack of contiguity can prove a political gerrymandering claim. Although the petitioners contend that they have a novel First Amendment claim, in reality, the claim is based on the same foreclosed arguments as their other claims. They cannot escape dismissal merely by adopting a new label for a previously rejected and otherwise insubstantial claim.

ARGUMENT

I. SECTION 2284 AUTHORIZES A SINGLE JUDGE TO DISMISS A REAPPORTIONMENT CHALLENGE UNDER RULE 12(B)(6) WHEN THAT CHALLENGE FAILS TO STATE A CLAIM.

In 1976, for the first time in the history of the three-judge-court statute, Congress "expressly recognize[d] the power of the single judge to determine that a three-judge court is not required." *Diversity Jurisdiction, Multi-Party Litigation, Choice of Law in the Federal Courts: Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the S. Comm. on the Judiciary*, 92d Cong. 86 (1971) (section-by-section analysis of bill). As the petitioners acknowledge, this case turns on how this Court interprets that phrase. In *Duckworth v. State Administrative Board of Elections Laws*, the Fourth Circuit set forth the standard that this Court should

adopt. It held that a single district judge properly determines that a three-judge court need not be convened to hear a challenge to a State's reapportionment legislation where the complaint fails to "state a set of facts, which, if proven to be true, would entitle [the plaintiff] to judicial relief." 332 F.3d at 772 (citing *Chisolm v. TranSouth Financial Corp.*, 95 F.3d 331, 334 (4th Cir. 1996)). That is, redistricting complaints failing to state a claim for relief sufficient to survive "a motion to dismiss under Rule 12(b)(6)" "properly are subject to dismissal by the district court without convening a three-judge court." *Id.* at 772-73.

The plain text of § 2284, as amended in 1976, supports this common sense result. So does Congress's purpose in enacting the three-judge-court statute: to provide a "procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy," *Phillips*, 312 U.S. at 251, while minimizing "interference with the normal adjudicatory and appellate processes of the federal judicial system[,]" *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 375 (1949). Observing that the "three-judge requirement is a technical one to be narrowly construed," this Court has found that the procedure is "not required" where the "reasons for convening an extraordinary court are inapplicable." *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *see also Phillips*, 312 U.S. at 251 (emphasizing that the three-judge-court statute was enacted, "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such").

A. The Text of 28 U.S.C. § 2284 Demonstrates That the Three-Judge-Court Procedure Does Not Impose a Jurisdictional Requirement on the Federal District Courts.

The 1976 amendments to § 2284 make clear that the statute provides a procedural framework for the disposition of cases required to be heard by a three-judge court, rather than a jurisdictional limit on the power of a single judge to decide an apportionment case. With the 1976 changes, § 2284 provided, for the first time, that the three-judge-court procedure is triggered only "upon the filing of a request for three judges" by the petitioner or by the respondent State. Because the procedure can be waived, the petitioners are incorrect that the statute "requires" that the district court convene a three-judge court to decide the merits of every case. Moreover, although Congress could have easily done so, it did not prescribe that district court judges employ the "insubstantiality" standard, previously used to test jurisdiction under the pre-1976 statute, when deciding whether a three-judge court is "required."

As this Court has "repeatedly held, the authoritative statement" of a statute's meaning "is the statutory text," *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005), and "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (internal citation omitted). In at least two ways, the plain text of 28 U.S.C. § 2284 recognizes that the three-judge-court procedure is "not required" in every

reapportionment challenge filed in the federal district courts, § 2284(b)(1), and, thus, is not a jurisdictional requirement.

First, the statute's procedural mechanism for convening a three-judge court does not commence with the filing of a complaint asserting a constitutional challenge to reapportionment, but is instead triggered upon a party's "filing of a request for three judges." 28 U.S.C. § 2284(b)(1). Indeed, only "upon the filing of a *request* for three judges" does the statute impose upon a single judge the duty to determine whether a three-judge court is required and, if so, to "notify the chief judge of the circuit" who shall designate the other two judges to comprise the court. *Id.* (emphasis added). The language in § 2284(b)(1) giving parties the choice to forgo a three-judge court forecloses the petitioners' argument that the three-judge-court statute is a jurisdictional requirement, because it is well established that "'subject-matter jurisdiction can never be forfeited or waived,'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 & n.11 (2006) (quoting *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

Though the petitioners prefer to read the statute as if the procedural mechanism is triggered upon the filing of any reapportionment challenge, even if no party requested three judges, Br. of Pet'rs 17, that is not the procedure Congress chose to adopt in 1976. Under the predecessor statute, a single judge's obligation to convene a three-judge court arose any time "an application" for an "interlocutory injunction" was presented to a single judge or justice. Thus, historically, it was the filing of a request for relief that required the convening of three judges, even when no

party requested a three-judge court. *See McLucas v. DeChamplain*, 421 U.S. 21, 28 (1975). By amending the statute in 1976 to make the three-judge procedural mechanism commence upon the filing of a request for that *procedure*, rather than a request for specific *relief*, Congress empowered the parties to waive a three-judge court even when the other statutory conditions are satisfied.

This change is consistent with this Court's longstanding view that the convening of a three-judge district court is an "extraordinary procedure," *Wilentz v. Sovereign Camp, W.O.W.*, 306 U.S. 573, 579 (1939), one that "'makes for dislocation of the normal structure and functioning of the lower federal courts [and] expands this Court's obligatory jurisdiction '" *Swift & Co. v. Wickham*, 382 U.S. 111, 128 (1965) (quoting *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, 92-93 (1960) (Frankfurter, J., dissenting)).

Second, upon the filing of a request for three judges, the statute authorizes the single district judge to "determine[] that three judges are not required." 28 U.S.C. § 2284(b)(1). If the single judge determines that three judges are "not required," then the remainder of the statutory provisions do not apply and the single district judge may adjudicate the case in accordance with generally applicable procedures, including those pertaining to a motion to dismiss. Only after a three-judge court is convened does the statute expressly limit the single judge's ability to conduct proceedings. *Id.* § 2284(b)(3). That is, once the three-judge court has been established under § 2284(b)(1) to "hear and determine the action or proceeding," *id.*, § 2284(b)(3)

provides that "[a] single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except" those specified in subsection (3). *See id.* (listing types of orders that a single judge may not enter during a three-judge-court proceeding, including "judgment on the merits").

Notably, Congress chose not to prescribe any particular standard that a single judge must employ when determining whether three judges are not required. Congress did not limit the scope of the district court's review to a determination that the district court lacks subject matter jurisdiction over the claim, as the petitioners contend. Indeed, because the statutory provision calling for a three-judge court "necessarily assumes that the District Court has jurisdiction," *see Ex parte Poresky*, 290 U.S. 30, 31 (1933), the petitioners' suggestion that the district court is authorized only to "determine[] that three judges are not required" due to the absence of subject matter jurisdiction makes little sense. *See Arbaugh*, 546 U.S. at 514 (stating that "courts have an independent obligation to determine whether subject-matter jurisdiction exists" (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) ("The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

Nor did Congress incorporate the terms "insubstantial" or "frivolous" to characterize claims for

which three judges are not required. Congress knows how to engraft that type of limitation on a federal court's review of a complaint, *see, e.g., Neitzke v. Williams*, 490 U.S. 319, 330-31 (1989) (holding Congress's description of certain claims as "frivolous" in the *in forma pauperis* statute had specific meaning distinct from Rule 12(b)(6) standard), and Congress does not hesitate to employ the terms "insubstantial" or "frivolous" if and when that is the intended meaning, *see, e.g.*, 15 U.S.C. § 6601(b)(4) (expressing legislative purpose to "lessen the burdens on interstate commerce by discouraging insubstantial lawsuits while preserving the ability of individuals and businesses that have suffered real injury to obtain complete relief"); 5 U.S.C. § 552(a)(4)(E)(ii)(II) (authorizing an award of attorneys' fees on judicial review of denial of records requested under the Freedom of Information Act where the court finds "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial"); 15 U.S.C. § 4304(a)(2) (in antitrust actions, authorizing award of attorneys' fees to a substantially prevailing defendant "if the claim, or the claimant's conduct during the litigation of the claim, was frivolous, unreasonable, without foundation, or in bad faith"). Congress's "use of explicit language in other statutes cautions against inferring a limitation in" § 2284(b)(1), which contains no such explicit language. *Marx v. General Revenue Corp.*, 133 S. Ct. 1166, 1177 (2013).

The plain text of the statute permits a single judge to determine, as the district judge did in this case, that "three judges are not required." By conferring such authority in plain terms, and further, by providing that a three-judge court is not required in every

reapportionment challenge and may be avoided entirely if no party requests three judges, the statute confirms that Congress did not categorically prohibit a single district judge from adjudicating a reapportionment challenge.

Moreover, the current version of 28 U.S.C. § 2284 does not present an instance where the statute adopted by Congress "clearly states that a threshold limitation . . . shall count as jurisdictional," and nothing in § 2284 "expressly restricts application of a jurisdiction-conferring statute." *Arbaugh*, 546 U.S. at 516 & n.11. In construing statutes, this Court has deemed it significant that Congress chose, as in this case, not to "'speak in jurisdictional terms.'" *Id.* (quotation omitted). To the extent the original three-judge-court statute was interpreted to be a jurisdictional requirement, *but see Bailey*, 369 U.S. at 33 (holding three-judge court was improperly convened and single district judge should have enjoined state statute that on its face was unconstitutional), Congress's 1976 amendments to the statutory scheme set forth above resolve any ambiguity on this issue. *See Exxon*, 545 U.S. at 557 (reiterating "that '[w]hatever [this Court] say[s] regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.'" (quoting *Finley v. United States*, 490 U.S. 545, 556 (2003)).

In arguing to the contrary, the petitioners emphasize that 28 U.S.C. § 2284(a) provides that a three-judge court "shall" be convened. However, "[i]nterpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any

precedents or authorities that inform the analysis." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Harbison v. Bell*, 556 U.S. 180, 198 (2009) ("This Court's interpretive function requires it to identify and give effect to the best reading of the words in the provision at issue."). Here, through its amendments to § 2284, Congress expressly granted authority to the single district judge to determine that three judges are not required and, thus, not to convene a three-judge court, and granted the parties the option of waiving the procedural device. Thus, an examination of Congress's use of "shall" "in light of context, structure, and related statutory provisions," *Exxon*, 545 U.S. at 558, demonstrates that § 2284 is not, as the petitioners contend, a jurisdictional statute.

Moreover, "[a] statute's use of [the word 'shall'] alone has not always led this Court to interpret statutes to bar judges (or other officials) from taking . action " *Dolan v. United States*, 560 U.S. 605, 611-12 (2010). Rather, most recently in *Dolan v. United States*, this Court concluded that Congress's use of the word "shall" in a statute setting forth a court's procedural requirements did not divest a judge of his or her authority to act. *See id.* at 611 (holding use of "shall" in victim restitution act's timing provision did not "deprive the court of the power to order restitution" when the court failed to act within the statutory deadline); *see also United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990) (holding use of "shall" in Bail Reform Act's prompt hearing provision did not deprive government "of all later powers to act"); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (use of "shall" without more was not a "jurisdictional

limit precluding action later"); *Brock v. Pierce Cnty.*, 476 U.S. 253, 262 (1986) (same).

Here, too, the three-judge court statute is "a procedural rule" that "govern[s] the distribution of judicial responsibility," *Swift & Co.*, 382 U.S. at 124, and is not a font of substantive rights conferred upon complainants. *See also Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 136 (1947) (observing that the three-judge-court requirement "is a technical rule of procedure to be applied as such").

Finally, 28 U.S.C. § 2284(b)(3) does not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits; rather, it prohibits a single judge from dismissing a claim on the merits only *after* a three-judge court has been convened. Subsection (b) sets forth "the composition and procedure of the court" for "any action required to be heard and determined by a district court of three judges under subsection (a)" of § 2284. Subsection (b)(1) prescribes that a three-judge court is convened where either party files a request for three judges and a district judge determines if three judges are required. Subsection (b)(2) provides how and when "notice of hearing of the action shall be given" to certain state officials.

Once a three-judge court has been convened, subsection (b)(3) prescribes which types of orders a single judge may, and may not, enter and provides that "[a]ny action of a single judge may be reviewed by the full court at any time before final judgment." By making specific reference to "the full court," this section inarguably pertains to cases being heard by three judges. Thus, subsection (b)(3)'s prohibition that

a "single judge shall not enter judgment on the merits" applies only when a three-judge court has been convened. This subsection does not prohibit a single judge from acting under subsection (b)(1) to determine preliminarily that three judges are not required because the complaint fails to state a plausible challenge to reapportionment.

B. The Rule in *Duckworth* Best Effectuates Congress's Purposes in Enacting Sweeping Reforms to § 2284.

As this Court has instructed, the decisions in *Iqbal* and *Twombly* prescribe "the pleading standard for '*all* civil actions.'" *Iqbal*, 556 U.S. at 684 (quoting Fed. R. Civ. P. 1; emphasis added).[2] The Rule 12(b)(6) standard, as this Court has explained, allows for a complaint's "'basic deficiency'" of failing to "raise a claim of entitlement to relief" to "'be exposed at the point of minimum expenditure of time and money by the parties and the court.'" *Twombly*, 550 U.S. at 558 (quoting 5 Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc. Civ.* § 1216 at 233-34 (3d ed.) (internal quotation omitted)). In the context of 28 U.S.C. § 2284, the most efficient use of the parties' and courts' resources would be to dismiss a complaint that fails to state a claim as early in time and with as little inconvenience to the lower federal courts as possible.

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[2] Rule 1 provides that the Federal Rules of Civil Procedure "govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81." Rule 81 specifies proceedings in which the Rules have limited application or do not apply. Rule 81 does not mention redistricting challenges under 28 U.S.C. § 2284.

Given the great frequency with which district judges decide Rule 12(b)(6) motions, in the context of all manner of constitutional claims, adhering to this well-understood practice establishes a more workable rule and a "more settled procedural system by which these cases are to run the judicial gauntlet." *Yazoo Cnty. Indus. Dev. Corp. v. Suthoff*, 454 U.S. 1157, 1160-61 (1982) (Rehnquist, J., dissenting from denial of cert.) (highlighting the confusion "among the Federal Courts of Appeals in deciding whether the federal question alleged in a complaint is 'wholly insubstantial and frivolous'").

1. The rule in *Duckworth* furthers Congress's purpose in enacting the three-judge-court procedure while minimizing the burden on the federal courts.

a. As this Court has long recognized, "Congress established the three-judge-court apparatus for one reason: to save state statutes from improvident doom, on constitutional grounds, at the hands of a single federal district court." *Gonzalez*, 419 U.S. at 97. In the wake of this Court's decision in *Ex parte Young*, "the fact that one Federal judge [could] tie[] the hands of a sovereign State in this manner" caused "great feeling among the people of the States." 42 Cong. Rec. 4847 (1908) (statement of Sen. Overton). The sponsor of the three-judge-court legislation, Senator Overton of North Carolina, explained that "[w]henever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State, when there

was almost a rebellion" over these injunctions. 45 Cong. Rec. 7256 (1910).

Congress determined that the three-judge court would protect States by preventing single judges from making "hasty" and ill-considered decisions to grant preliminary injunctions and by "recogniz[ing] the superior degree of consideration and sanction which should be given to a state statute." 45 Cong. Rec. 7253 (1910) (statement of Sen. Burton). Moreover, in the event that a preliminary injunction did issue, a State would be able to appeal directly to the Supreme Court "so that the state[] shall be put to the least possible inconvenience in the administration of [its] laws." *Mayo*, 309 U.S. at 319. The Act, in the view of its congressional sponsors, would also promote public confidence in, and official deference to, any federal court judgment overturning state law: As Senator Overton emphasized, if "three great judges say that the statute is unconstitutional, the officers of the State will be less inclined to resist" and "the people" will be more "inclined to abide by the decision." 42 Cong. Rec. 4847 (1908) (statement of Sen. Overton); *see also* 45 Cong. Rec. 7256 (1910) (statement of Sen. Overton).

"The sole and simple purpose" of the Act was thus "to prevent a single inferior Federal judge from pronouncing a law of a State unconstitutional." 42 Cong. Rec. 4852 (1908) (statement of Sen. Knox). This singular purpose continued to motivate Congress as it refined the three-judge-court apparatus over the ensuing decades. In 1937, for example, Congress enacted a parallel three-judge-court statute to protect federal legislation from the same hasty, imprudent invalidation that had plagued the States. Act of Aug.

24, 1937 ch. 754, 50 Stat. 752. "Repeatedly emphasized during the congressional debates were the heavy pecuniary costs of the unforeseen and debilitating interruptions in the administration of federal law" that were "wrought by a single judge's order, and the great burdens entailed in coping with harassing actions brought one after another to challenge the operation of an entire statutory scheme until a judge was ultimately found who would grant the desired injunction." *Kennedy*, 372 U.S. at 154.

b. Even in 1976, when Congress substantially narrowed the three-judge-court requirement, it continued to focus on protecting the States from imprudent actions by the federal courts in cases, like apportionment suits, where such protection was still necessary. Congress believed that, in most cases, the three-judge court was no longer necessary to serve its original purpose because intervening statutory changes and court decisions had made it less likely that federal courts would excessively intrude into state prerogatives or make hasty decisions to enjoin state statutes. *See* S. Rep. No. 94-204, at 7-8. In the words of a representative from the American Bar Association, the three-judge court was an "anachronism" because "[r]emedial legislation" and "improved court procedures" had largely eliminated the need for them. *Improvement of Judicial Machinery: Hearings on H.R. 6150 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 94th Cong. 1, 131 (1975) (written testimony of Bernard Segal).

In most cases, Congress could no longer justify the "severe burden" of the three-judge-court apparatus, *Ex*

parte Collins, 277 U.S. 565, 569 (1928), on the Federal judiciary. *See* S. Rep. No. 94-204, at 3-4. "Whenever such a court [was] required, a second district judge, as well as a judge of a circuit court of appeals, [had to] be brought in to hear and determine the case." *Id.* at 4. The process of deciding the cases themselves was also "very cumbersome" because the three-judge court had to "take[] evidence" and collectively rule on matters as they arose during trial. 1972 Hearings at 784 (testimony of Judge Skelly Wright). Moreover, the direct appeals in those cases to this Court also "consume[d] a disproportionate amount" of the Court's time and attention. S. Rep. No. 94-204, at 4. The three-judge-court scheme was clogging this Court's appellate docket and "depriving [this Court] of the wise and often crucial adjudications of the courts of appeals." *Allen v. State Bd. of Elections*, 393 U.S. 544, 562 (1969).

Despite this burden, Congress concluded that the three-judge-court apparatus was essential to protect the States in one key area: "cases involving congressional reapportionment or the reapportionment of a statewide legislative body." S. Rep. No. 94-204, at 9. In Congress's view, "these issues [were] of such importance that they ought to be heard by a three-judge court." *Id.*; *see also* 119 Cong. Rec. 16680 (1973) (statement of Sen. Burdick). These cases were not just important in the abstract; rather, Congress decided that three-judge courts were necessary for precisely the same reasons that the original Three-Judge-Court Act had been enacted – to prevent a single federal judge from usurping a State's authority.

After this Court's decisions in *Baker v. Carr* and *Reynolds v. Sims*, 377 U.S. 533 (1964), the "record of the district courts" in dealing with the new, controversial one-person/one-vote reapportionment cases was "unsettling." *Three-Judge Courts and Six-Person Jury: Hearings on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the H. Comm. on the Judiciary*, 93d Cong. 1, 91 (1973-1974) ("1973-1974 Hearings") (testimony of Assistant Attorney General Robert G. Dixon, Jr.). Plaintiffs were offering their own, purportedly "more equal," redistricting plans that were "radically different politically" from the State's plan, and many district courts were ordering States to adopt these plans before the next election. *Id.* This posed a substantial risk to state sovereignty because, unless the district court's order were stayed pending appeal, the new legislature "elected under the plaintiffs' plan could reapportion the State on a permanent basis." *Id.* at 87. In a number of these cases, this Court had to stay the district court's order on direct appeal. *Id.* at 91.

Thus, "[o]nly the provision for prompt Supreme Court review, and the resultant stays pending appeal avoided use of dubious plaintiff plans in several states." *Id.* The political nature of these suits also heightened the risk of having one judge overturn a State's congressional districting plan and impose his or her own districting plan. Federal intervention in state elections "involv[es] a potential for substantial interference with government administration," *Allen*, 393 U.S. at 562, and thus it was deemed "more acceptable . . if such cases are heard by a court whose members include adherents of more than one political

party." 1972 Hearings at 749 (testimony of Chief Judge Henry Friendly).

As Judge Skelly Wright emphasized in his testimony before the Senate, "this is an area of great public concern *that continues to need the protection that the three-judge district courts were originally designed to give*." 1972 Hearings at 791 (emphasis added). "No one Federal judge," he explained, should be able to "set aside what the Congress has done or what the State legislature has done." *Id.* The sponsor of the legislation, Senator Burdick, expressly agreed with this assessment. *Id.* at 792. During the debates over the 1976 amendments, therefore, Congress had in mind two principal goals: (1) to continue to protect the States from the actions of single district judges in reapportionment cases and (2) to minimize the severe burden of three-judge courts on the federal judiciary.

c. The Rule 12(b)(6) standard effectuates the congressional purposes of the Act and the 1976 amendments far better than the insubstantiality test. There is, of course, no risk that permitting a single judge to dismiss a meritless claim will interfere with the State's sovereignty or "paralyze totally the operation of" the State's electoral process. *Kennedy*, 372 U.S. at 154. Dismissal of a meritless claim also poses no risk that a single district judge could impose his or her own reapportionment plan that is "radically different" from the State's plan and thwart the will of the majority by requiring that plan to go into effect before the next election. 1973-1974 Hearings at 87, 91 (testimony of Robert G. Dixon). In other words, "[i]t is certain that the congressional policy behind the three-judge-court and direct-review apparatus – the saving of

state . . . statutes from improvident doom at the hands of a single judge – will not be impaired," *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975), by permitting a single judge to dismiss a complaint that fails to state a claim under Rule 12(b)(6).

The petitioners contend that all reapportionment cases, even meritless ones, should be heard by a three-judge court because reapportionment cases are "important." However, congressional purpose here was asymmetric in that the Act was intended solely for the benefit of the States. "Congress intended that prompt hearing and decision shall be afforded the parties" in these cases "so that the states shall be put to the least possible inconvenience in the administration of their laws," *Mayo*, 309 U.S. at 318-19, not to benefit plaintiffs who file meritless claims. Forcing a State to litigate in front of a three-judge court when a single judge could easily have dismissed the complaint would, in direct contravention of this purpose, subject the State to far greater inconvenience.

Moreover, three-judge courts impose a significant burden on the judiciary, a burden that Congress sought to alleviate by enacting the sweeping 1976 amendments. As this Court has recognized, convening a three-judge court "makes for dislocation of the normal structure and functioning of the lower federal courts [and] not only expands this Court's obligatory jurisdiction but contradicts the dominant principle of having this Court review decisions only after they have gone through two judicial sieves. . . ." *Swift & Co.*, 382

U.S. at 128 (internal quotation omitted).[3] There is simply no indication that Congress intended to clog the dockets of the lower federal courts with meritless apportionment claims or give those meritless claims a direct appeal to this Court.

2. The statutory objectives claimed by petitioners in their interpretation of § 2284 directly conflict with the goals that Congress actually sought to achieve.

a. In light of the congressional purposes in enacting the initial three-judge court statute and the 1976 amendments, there is no compelling rationale for importing the "insubstantiality" test for which the petitioners advocate. Neither the text of the statute

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[3] In Maryland alone complainants filed seven separate actions in federal district court challenging Maryland's redistricting plan enacted in response to the 2010 census, up from the four federal court challenges to the State's 2000 redistricting plan. *See Steele v. Glendening*, Civil No. WMN-02-1102 (D. Md. June 13, 2002); *Mitchell v. Glendening*, Civil No. WMN-02-602 (D. Md. July 8, 2002); *Duckworth v. State Bd. of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002), *aff'd*, 332 F.3d 769 (4th Cir. 2003); *Kimble v. State of Maryland*, Civil No. AMD-02-2984 (D. Md. June 10, 2004), *aff'd*, (4th Cir. Feb. 1, 2005); *Martin v. Maryland*, Civil No. RDB-11-00904, 2011 WL 5151755 (D. Md. Oct. 27, 2011); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011), *aff'd*, 133 S. Ct. 29 (2012); *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014), *aff'd*, *Benisek v. Mack*, 584 F. App'x 140 (2014), *cert. granted sub nom.*, *Shapiro v. Mack*, No. 14-990, 135 S. Ct. 2805 (June 8, 2015); *Parrott v. Lamone*, Civil No. 1:15-cv-01849-GLR (D. Md. June 24, 2015); *Bouchat v. Maryland*, Civil No. 1:15-cv-02417-ELH (D. Md. Aug. 31, 2015).

nor the legislative history support it. Absent any jurisdictional basis for importing the "insubstantiality" test into § 2284, such a standard finds no support in the federal rules of civil procedure, which "ha[ve] the force of a federal statute." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 13 (1941).

The petitioners argue that under *Duckworth*, "the result is likely to be years of litigation before the plaintiffs receive a final answer just on the threshold question of whether they are entitled to a hearing before a three-judge court." Br. of Pet'rs 32. The legislative history demonstrates, however, that the Act was intended to check the district court's ability to paralyze a State's statutory scheme and not as an entitlement to those challenging state law.

Moreover, the petitioner's arguments regarding the effect of a dismissal under Rule 12(b)(6) apply equally to a dismissal for lack of a substantial federal claim. In either case, plaintiffs must proceed to the Court of Appeals if they wish to seek reversal of a wrongly dismissed complaint. Although it is conceivable that in a given case both the district court and court of appeals might err in concluding that three judges were not required because the complaint, on its face, failed to state a claim for relief, such a coincidence of error is just as likely to arise under the petitioners' proposed substantiality test. In any event, such cases are likely to be rare given how frequently challenges to reapportionment claims are dismissed at the pleadings stage. *See* Justin Levitt, *Litigation in the 2010 Cycle, All About Redistricting*, http://redistricting.lls.edu/cases.php (last visited Sept. 22, 2015) (compiling statistics

on redistricting challenges in 2010 cycle).[4] Thus, to the extent the *Duckworth* rule leads to "duplicative" appeals in a small number of cases, that risk of some occasional inefficiency would be more than justified by the overall savings to judicial economy that would result from reducing the number of cases heard by three-judge courts.

b. The petitioners also contend that the rule in *Duckworth* will undermine the statute's purpose of "'ensuring this Court's swift review'" of the merits. Br. of Pet'rs 31 (quoting *Gonzalez*, 419 U.S. at 98). The legislative history demonstrates, however, that "swift review" in this Court was conceived as a check on the district court's ability to paralyze a State's statutory scheme and not as an entitlement to those challenging state law. In any case, courts of appeals possess the ability to expedite review where warranted. If the circumstances require it, "the threshold question" may be answered quickly.[5]

Although "[a]llegations of unconstitutional bias in apportionment are most serious claims," *Vieth*, 541 U.S. at 311-12 (Kennedy, J., concurring), so too are all manner of claims of unconstitutionality that the lower federal courts routinely decide at the pleadings stage. In cases involving substantial deprivations of liberty, including the prior restraint of First Amendment

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[4] In the eleven cases challenging Maryland's two most recent redistricting plans, *see*, *supra*, n.3, only one of the nine cases thus far decided by the district court survived a motion to dismiss on the pleadings.

[5] In this case, the Fourth Circuit affirmed the district court's dismissal order within six months.

rights, litigants must proceed through the lower federal courts, with no guarantee that this Court will take up the issues. In such cases, as Chief Justice Burger noted when he urged Congress to eliminate entirely the three-judge-court procedure, "[t]here are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it." S. Rep. No. 94-204 at 3 (quoting Remarks of Warren E. Burger, Chief Justice of the United States, before the American Bar Association, San Francisco, Calif., Aug. 14, 1972).[6]

Nor will the *Duckworth* standard deprive this Court of direct review of reapportionment challenges where a three-judge court dismisses the claim on the merits. *See* Br. of Pet'rs 34. The petitioners misunderstand the statutory scheme by conflating a single judge's determination that three judges are not required with a three-judge court's decision on the merits. Section 2284 expressly provides that a single judge determines whether three judges are required; the statute grants no review of that initial decision to a three-judge court. Thus, a three-judge court's dismissal of an action for failure to state a claim does not "overrule" a single judge's determination that the three-judge court was required. That the decisions may have been based on

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[6] The petitioners' plea that being made to wait for direct appeal in this Court may "frustrate" the purposes of their lawsuit because "it may be too late for effective relief," Br. of Pet'rs at 33, rings particularly hollow given that they waited to file their complaint in the district court until after this Court had already summarily affirmed the three-judge court's determination on the merits in *Fletcher v. Lamone*, upholding Maryland's redistricting legislation against constitutional attack.

the same legal standard does not contradict their distinct statutory significance. Under *Duckworth*, where a single judge determines that a three-judge court is required, and the three-judge court proceeds to dismiss the action on its merits, a direct appeal lies in this Court. *See* 28 U.S.C. § 1253. Unquestionably, this Court has appellate jurisdiction to review the threshold question whether a three-judge court was required and, if answered in the affirmative, to review the three-judge court's decision on the merits.

C. This Court's Precedents Interpreting the Pre-1976 Three-Judge-Court Statute Support the Adoption of a Standard That Best Effectuates the Congressional Purposes.

This Court's precedents interpreting the pre-1976 statute did not purport to address the standard by which a district judge "determines that three judges are not required," because the pre-1976 statute did not contain this express grant of authority. Rather, under the prior statutory scheme, "[t]he district judge to whom the application for injunction or other relief is presented shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284 (1970).

Before 1976, the single district judge had no express authority to determine whether a three-judge court was required. In order "to make workable sense" of the three-judge-court "procedural statutes," *see Gonzalez*, 419 U.S. at 95-98, however, this Court made clear that the "extraordinary procedure" was reserved for cases "of unusual gravity." *Ex parte Collins*, 277 U.S. at 569.

Thus, cases composed of "groundless allegations," *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934), or that were "obviously without merit," *Goosby v. Osser*, 409 U.S 512, 518 (1973), could be disposed of by a single district judge.

Indeed, shortly after the enactment of the three-judge-court statute, this Court adopted a judge-made limitation grounded in whether the claim of unconstitutionality was a "substantial" one. *See, e.g., Louisville & N.R. Co. v. Garrett*, 231 U.S. 298 (1913) (explaining that under the statute "the question of unconstitutionality must be a substantial one"); *Wilentz*, 306 U.S. at 582 ("The extraordinary procedure before a court of three judges cannot properly be extended to cases in which there is no substantial basis for relief "); *California Water Serv. Co. v. City of Redding*, 304 U.S. 252, 254 (1938) (observing the district court's "duty to scrutinize the bill of complaint to ascertain whether a substantial federal question is presented, as otherwise the provision for the convening of a court of three judges is not applicable"); *see also Poresky*, 290 U.S. at 32.

Notably, at that time, where a suit was brought in federal court based on a federal question, this Court's use of the term "substantial" to describe the merits of a claim was not necessarily synonymous with a check on the court's jurisdiction to decide the claim. *See, e.g., Swafford v. Templeton*, 185 U.S. 487, 493-94 (1902) (observing that there is "jurisdiction to entertain [cases based on a federal question], although the averments set out to establish the wrong complained of or the defense interposed were unsubstantial in character"). Although it has since become a "settled rule that the

insubstantiality of a federal question is the occasion for a jurisdictional dismissal as opposed to a dismissal on the merits for failure to state a claim upon which relief can be granted," *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970), in many cases this Court's inquiry as to whether a hearing by a three-judge court was "not required," and thus whether appellate jurisdiction was lacking in this Court, "was not one of the federal jurisdiction of the District Court." *Oklahoma Gas & Elec. Co.*, 292 U.S. at 391 (citations omitted); *Wilentz*, 306 U.S. at 582 (same).

Rather, observing that the "three-judge requirement [was] a technical one to be narrowly construed," this Court continued to narrow the scope of the three-judge court procedure, finding that it was "not required" where the "reasons for convening an extraordinary court [were] inapplicable." *Bailey*, 369 U.S. at 33 (1962); *see also Gonzalez*, 419 U.S. at 97-98 (acknowledging that this Court did not always adhere to "the literal words of the statutory apparatus" where they bore "little or no relation to [the] underlying policy" of protecting state statutes from "improvident doom at the hands of a single federal district judge"). In *Bailey*, for example, this Court held that a three-judge court was "not required" where the plaintiffs challenged a statute requiring racial segregation of transportation facilities, a statute the Court deemed so obviously unconstitutional that consideration by a three-judge court was unwarranted. 369 U.S. at 33.

Thus, even though subject matter jurisdiction was clearly vested in the district court, this Court nonetheless held that a single district judge could

enjoin a state law because "the policy behind the three-judge court requirement – that a single judge ought not to be empowered to invalidate a state statute under a federal claim – does not apply." *Id.* Similarly, in *Swift & Co. v. Wickham*, this Court, emphasizing "the important considerations of judicial administration" and "concern for efficient operation of the lower federal courts," held that a three-judge court was *not* required in a suit seeking an injunction on the ground that a state law conflicted with a federal law and thus, violated the Supremacy Clause. 362 U.S. at 128; *see also Ex parte Collins*, 277 U.S. at 568 (holding "[d]espite the generality of the language" of the three-judge-court statute, that it did not apply to a suit where "although the constitutionality of a statute is challenged," the suit does not seek to enjoin "the enforcement of a statute of general application").

In the 1976 amendments to 28 U.S.C. § 2284, Congress acknowledged that a three-judge court is "not required" to hear every challenge to a State's redistricting legislation and expressly authorized the single district judge to make that determination before convening a three-judge court. 28 U.S.C. § 2284(b)(1). Where a challenge fails to state any claim for relief, single judges, who frequently decide the merits of cases challenging the constitutionality of state statutes, may determine that three judges are not required and dismiss the challenge. That is, in such cases, the "reasons for convening an extraordinary court are inapplicable." *Bailey*, 369 U.S. at 33.

II. PETITIONERS' CLAIMS ARE INSUBSTANTIAL.

Even if the Court were to conclude that § 2284(b)(1) does not permit a single judge to "determine[] that three judges are not required" based on the legal insufficiency that generally necessitates dismissal of a complaint under Rule 12(b)(6), the Court should still affirm the dismissal of the petitioners' complaint because it is insubstantial, as that term was used prior to the 1976 Congressional enactment at issue. *See N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 722 (2001) (noting this Court's "settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason'") (citations omitted). Indeed, the petitioners effectively concede that their claims under the Fourteenth Amendment and Article 1 are insubstantial and contend only that their First Amendment claim is "not frivolous." Br. of Pet'rs 35 (stating that "petitioners have presented a non-frivolous First Amendment claim").

Whether evaluated under the Fourteenth Amendment, Article 1 § 2 or the First Amendment, the petitioners' claims are insubstantial in that they are "'obviously without merit,'" *Goosby*, 409 U.S. at 518 (citation omitted), and "their unsoundness" is made clear by "previous decisions of this court," *Poresky*, 290 U.S. at 32. Notwithstanding the petitioners' suggestion that their First Amendment claim is substantial even though the "merits" of the district court's disposition of the rest of the amended complaint "are not subject to challenge here," Pet. 9 n.2, the petitioners cannot separate the First Amendment claim from the rest of

the complaint. The First Amendment claim is insubstantial for the same reasons that their other claims, which they appear to have abandoned, are insubstantial.

As drafted by the petitioners, the complaint and amended complaint emphasized that their three constitutional claims all arose from a single grievance, namely, "that the essentially non-contiguous structure and discordant composition of the separate distinct pieces comprising the 4th, 6th, 7th, and 8th Congressional districts impermissibly abridge [their] rights" under Article I, § 2 of the U.S. Constitution, the Fourteenth Amendment, and the First Amendment, Opp. App. 29 ¶ 2; *see* 2 ¶ 2 (same).

In such circumstances, where the same feature of a State's reapportionment is claimed to offend more than one constitutional provision, this Court has treated the various constitutional theories as a single set for purposes of analysis. *See, e.g.*, *LULAC*, 548 U.S. at 416, 416-20 (Kennedy, J.) (analyzing together the plaintiffs' claims that "mid-decennial redistricting, when solely motivated by partisan objectives, violates equal protection and the First Amendment"); *id.* at 461-62 (Stevens, J., concurring in part, dissenting in part) (same). Moreover, the only "standard" proposed by the petitioners in their complaint and amended complaint evidently purports to apply to the case as a whole. *See* Opp. App. 42 ¶ 21 ("[T]he standard we propose *for this case* – a presumption of invalidity if an individual district has neither effective geographic nor demographic contiguity " (emphasis added)).

Viewing the complaint as a whole, the petitioners' theory or "standard" for addressing alleged partisan

gerrymandering or denial of representation is foreclosed by this Court's precedent because the petitioners' "effective geographic" or "demographic contiguity" test "is, in substance, markedly similar to tests that have already been rejected by the courts," Pet. App. 18a, and, most significantly, by this Court.[7] This Court, after all, "has rejected standards that 'are not discernible in the Constitution' and have 'no relation to Constitutional harms.'" *Fletcher*, 831

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[7] *See Vieth*, 541 U.S. at 281-82 (plurality opinion) (rejecting as partisan gerrymandering standard "'both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group'" (citation omitted)); *id.* at 290-91 (rejecting as standard "whether district boundaries had been drawn solely for partisan ends to the exclusion of 'all other neutral factors relevant to the fairness of redistricting,'" with the "most important" factor being "'the shapes of voting districts and adherence to established political subdivision boundaries'" (citation omitted)); *id.* at 284 (rejecting as standard whether "mapmakers acted with a predominant intent to achieve partisan advantage,' as shown by evidence "that other neutral and legitimate redistricting criteria were subordinated to the goal of achieving partisan advantage"); *id.* at 295-96 (rejecting five-part test requiring plaintiff to show "(1) that he is a member of a 'cohesive political group'; (2) 'that the district of his residence. . . paid little or no heed' to traditional districting principles; (3) that there were 'specific correlations between the district's deviations from traditional districting principles and the distribution of the population of his group'; (4) that a hypothetical district exists which includes the plaintiff's residence, remedies the packing or cracking of the plaintiff's group, and deviates less from traditional districting principles; and (5) that 'the defendants acted intentionally to manipulate the shape of the district in order to pack or crack his group'" (citation omitted)); *id.* at 299 (rejecting as standard "'the unjustified use of political factors to entrench a minority in power'" (citation omitted)).

F. Supp. 2d at 909 (Williams, J., concurring) (quoting *Vieth*, 541 U.S. at 295).

The petitioners' amended complaint both concedes that Maryland's enacted Congressional districts are contiguous within the commonly understood meaning of the term, Opp. App. 46 ¶ 25, and further acknowledges the lack of any "Constitutional or statutory mandate for contiguous districts." Opp. App. 44 ¶ 24(b). *See Shaw v. Reno*, 509 U.S. 630, 647 (1993) (emphasizing that "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" are not "constitutionally required") (citing *Gaffney v. Cummings*, 412 U.S. 735, 752, n.18 (1973)); *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality opinion) ("The Constitution does not mandate regularity of district shape."); *id.* at 1029 (Breyer, J., dissenting) (noting that this Court has "assured States that the Constitution does not require compactness, contiguity, or respect for political borders"). If actual geographic contiguity is not "constitutionally required," *Shaw*, 509 U.S. at 647, then necessarily the petitioners' more demanding – and more amorphous – "effective" or "*de facto* contiguity" test could have no conceivable basis in the Constitution.

Similarly, although the petitioners propose a "demographic contiguity" component calling for districts to be drawn based on "shared interests – demographic, ethnic, racial, socioeconomic, and political," Opp. App. 48 ¶29, the amended complaint itself recognizes that under the Constitution "communities of interest are not entitled to representation," *id.* 49 ¶29. *See Bush*, 517 U.S. at 977-

78 (A "constitutional problem" involving "'a State's discretion to apply traditional districting principles'" such as "maintaining communities of interest and traditional boundaries" would "arise[] only from the subordination of those principles to race.").

Even if it were possible to isolate completely the petitioners' First Amendment claim from their other averments, the claim would still be just as insubstantial as the rest of the amended complaint. First, the petitioners' claim suffers from the same deficiency that, in the view of Justice Kennedy, doomed the unsuccessful First Amendment claim in *LULAC*, 584 U.S. at 418 (Kennedy, J.). That is, whether the claim of partisan gerrymandering is based on the First Amendment or any other source of constitutional authority, at a minimum the complainants must "show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id.*; *see also Vieth*, 541 U.S. at 315 (Kennedy, J., concurring) (opining that the availability of a First Amendment basis for challenging reapportionment "depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters"). The only "standard" proposed by the petitioners here is the same "geographic and demographic contiguity" theory that they proffered in support of their other claims, which, as the district court correctly discerned, bears a fatal resemblance to the proposed standards that this Court has already rejected as unmanageable, Pet. App. 18, and which the petitioners themselves appear to concede are insubstantial.

In fact, it is difficult to imagine any standard that would afford all individuals in the electorate the same entitlement that the petitioners claim: (1) the supposed right not to be apportioned into a "discrete small section" of a district that also includes residents of a "larger segment" who do not share "similarity of political views" or other "demographic factors," Opp. App. 43 ¶ 22, *and* (2) a guaranteed opportunity to "vot[e] in the determinative (primary) election for their Representative," irrespective of one's party affiliation, Opp. App. 50 ¶ 32. The realities of geography, demographics, and the "one person-one vote" imperative render the former unattainable, while this Court's precedent precludes the latter. *See Rosario v. Rockefeller*, 410 U.S. 752 (1973).

The insubstantiality of the petitioners' First Amendment claim becomes even more apparent when measured against this Court's precedent addressing "the First Amendment's protection of political association," which the petitioners expressly invoke. Opp. App. 17 ¶ 23; 44 ¶ 23. "The First Amendment protects the right of citizens to associate and to form political parties for the advancement of common political goals and ideas," and "[a]s a result, political parties' government, structure, and activities enjoy constitutional protection." *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986) (First and Fourteenth Amendment protection of political association includes "freedom to engage in association for the advancement of beliefs and ideas," "partisan political organization," and "[t]he right to associate with the political party of one's choice.") (internal quotations omitted).

The petitioners conceded below that the State's enacted districting plan does not deny them the ability to "associate and to form political parties for the advancement of common political goals and ideas," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997). *See* Resp. Br. App. 2 (CM/ECF Doc. No. 18, Plaintiffs' Opp. to Defs.' Mot. to Dismiss at 42 ¶60 (admitting that "Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives" but complaining that those activities have "minimal impact").) Moreover, the amended complaint does not allege that the reapportionment itself interferes with "political parties' government, structure, and activities." *Timmons*, 520 U.S. at 358. Given the petitioners' concession and the absence of any pertinent contrary allegation in the amended complaint, the petitioners' claim can be no more substantial than the First Amendment claim that was rejected in *Anne Arundel County Republican Central Committee v. State Administrative Board of Elections*, which this Court summarily affirmed, 504 U.S. 938 (1992).

As the district court concluded, "'nothing [about the congressional districts at issue in this case] affects in any proscribed way [P]laintiffs' ability to participate in the political debate in any of the Maryland congressional districts in which they might find themselves. They are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives.'" Pet. App. 20a-21a (quoting *Duckworth*, 213 F Supp. 2d at 557-58; *Anne Arundel Cnty. Republican Cent. Comm.*, 781 F. Supp. at 401 (brackets in original)).

The insubstantiality of the petitioners' claims can be confirmed by making the same comparison that Justice Kennedy made in *LULAC*, 548 U.S. at 420. That is, the challenged redistricting plan in Texas was deemed objectively "fairer than the [Pennsylvania] plan that survived in *Vieth*," which had "led to a Republican majority in the congressional delegation despite a Democratic majority in the statewide vote." *LULAC*, 548 U.S. at 419. The Texas plan could be deemed "fairer" on its face than the plan upheld in *Vieth*, and, therefore, not constitutionally suspect, because "a congressional plan that more closely reflects the distribution of state party power," as the Texas plan did, "seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority," as the Pennsylvania plan did. *Id.* at 419.

Like the Texas plan, Maryland's enactment is also demonstrably "fairer" than the Pennsylvania plan this Court upheld in *Vieth*. Unlike Pennsylvania's reapportionment, Maryland's congressional plan "more closely reflects the distribution of state party power" and does not "entrench[] an electoral minority." *LULAC*, 548 U.S. at 419. Although the petitioners complain that "each of the abridged sections" of the map they challenge "voted strongly Republican in the 2008 Presidential election," Opp. App. 31 ¶ 5, and they note that 7 of the Maryland's 8 congressional districts are represented by Democrats, Opp. App. 29 ¶ 2, the Democratic Party has long been the majority party in Maryland.[8] Therefore, Maryland's plan is "a less likely

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[8] In the most recent primary election held in 2014, Maryland's registered Democrats outnumbered Republicans by 2,051,319 to 950,195, a ratio of more than 2:1. *See* Resp. Br.

vehicle for partisan discrimination," *LULAC*, 548 U.S. at 419, than the reapportionment this Court upheld in *Vieth*.

Finally, the petitioners' claim for relief is rendered insubstantial by their still unexplained two-year delay in bringing their challenge to the 2011 redistricting. Petitioners waited to file suit until more than two years after the plan was enacted; more than 15 months after the plan had survived challenges in three other federal cases, including one that resulted in this Court's summary affirmance; and a year after voters in the redrawn districts had gone to the polls to elect their representatives to Congress. The petitioners themselves acknowledge that redistricting cases are "time-sensitive," and that "delay may also undermine the underlying purpose of the suit." Pet. 23, 22. Courts have held that a plaintiff's delay in bringing a redistricting challenge and the resulting threat of disrupting the election process may render a claim insubstantial due to the unavailability of injunctive relief. *See, e.g.*, *Simkins v. Gressette*, 631 F.2d 287, 290, 295-96 (4th Cir. 1980) (insubstantiality of claim may result "because injunctive relief is otherwise unavailable"); *Maryland Citizens for a Representative Gen. Assembly v. Governor of Md.*, 429 F.2d 606, 611 (4th Cir. 1970) (same); *MacGovern v. Connolly*, 637 F. Supp. 111, 114 (D. Mass. 1986) (same); *cf. Reynolds*, 377 U.S. at 585 (in awarding or withholding relief, a court should "endeavor to avoid a disruption of the election process").

App. 5 (http://www.elections.state.md.us/press_room/2014_stats/PrecinctRegisterCounts_ByCongressionalDistrict.pdf (visited Sept. 18, 2015)).

CONCLUSION

The judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

Civil No.: JKB-13-CV-3233

[Filed December 31, 2013]

O. JOHN BENISEK, et al)
)
Plaintiffs)
)
v.)
)
BOBBIE S. MACK, Chairman,)
Maryland State Board of Elections, et al)
)
In their official capacities)
)
Defendants)

* * * * * * * *

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

* * *

[Pages 42-43]

58. Courts have held the impact of a state's primary election system to be a factor into whether classes of voters may be impermissibly denied effective participation in the political process. See *Washington v. Finlay* (664 F.2d 913), paragraph 29, and *Lodge v Buxton* (639 F.2d 1358), paragraph 74: "As the District Court correctly pointed out, '(e)lection in the (Democratic) primary is 'tantamount' to election to the

office'." While *Lodge* specifically addressed internal discrimination within another state's Democratic party, Republican voters in the challenged districts are completely precluded from voting in the primary that is "tantamount to election."

59. We discuss in paragraph 32 of our Amended Complaint where Courts have required States to balance voting rights and other laws that may enact that impact voting. While we do not contend that the State is required to adopt an open primary, we do contend that Maryland's closed primary system combined with the intentional structure of the challenged districts results in an intentional impermissible infringement of first amendment rights. Voters in the smaller segments were placed into these districts to minimize their votes because they are largely Republicans. We previously discussed intent in paragraphs 49-53 above, and harms in paragraphs 38-40 above.

60. We expressly disagree with Defendants contention on page 25 of their Motion that has no impact on our First Amendment rights. While Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives, the State has designed these districts to make such First Amendment activities of minimal impact. This is true to a far greater extent with respect to the challenged districts than to the 1991 districts that were the subject of the *Anne Arundel* cite on page 25 of the Defendants' Motion. Further, a position that first amendment rights are acceptably afforded in light of the mere expression of views and participation in political

activities—without considering the larger context as to whether the influence or effect of such expression and activities have been intentionally muted by the challenged actions—is more in keeping with *Colegrove* than with *Baker*, *Reynolds*, and *Wesberry*.

Conclusion

61. For the reasons set forth in our Amended Complaint and above, the Defendants' Motion to Dismiss for *Res Judicata* and for Insubstantiality should be denied; Plaintiffs' request to convene a three-judge panel of this Court should be granted; and Defendants' Motion to Dismiss for Failure to State a Claim should be referred to and denied by that three-judge panel.

* * *

Eligible Active Voters on the Precinct Register -
By Congressional District Code
2014 GUBERNATORIAL PRIMARY ELECTION
Election Date: 6/24/2014 ***As of June 7, 2014*

DISTRICT	COUNTY	DEM	REP	LIB	GRN	OTH	UNA	TOTAL
Congressional District Code 01	STATEWIDE	178,653	204,630	952	385	1,458	35,457	421,535
Congressional District Code 02	STATEWIDE	256,551	95,731	281	143	464	11,779	364,949
Congressional District Code 03	STATEWIDE	251,707	112,965	522	318	1,030	28,850	395,392
Congressional District Code 04	STATEWIDE	326,832	71,995	181	134	3,054	10,356	412,552
Congressional District Code 05	STATEWIDE	282,963	115,204	1,012	491	3,687	48,493	451,850

Congressional District Code 05	STATEWIDE	282,963	115,204	1,012	491	3,687	48,493	451,850
Congressional District Code 06	STATEWIDE	195,725	144,753	1,887	1,033	2,363	100,671	446,432
Congressional District Code 07	STATEWIDE	316,687	75,743	482	265	1,383	23,637	418,197
Congressional District Code 08	STATEWIDE	242,201	129,174	1,796	1,283	2,623	104,616	481,693
		2,051,319	950,195	7,113	4,052	16,062	363,859	3,392,600

* * *

No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

DAVID J. MCMANUS, JR. AND LINDA H. LAMONE,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

With the Three-Judge Court Act, Congress provided that certain cases of exceptional importance "shall * * * be heard and determined by a district court of three judges * * * unless [the single judge to whom the case is initially referred] determines that three judges are not required." 28 U.S.C. § 2284. As we demonstrated in our principal brief, there are just two circumstances in which "three judges are not required" within the meaning of the Act: (1) when the conditions for three-judge-court review set forth in Section 2284(a) are not met or (2) when the federal courts lack subject matter jurisdiction, including when the complaint's claims are "insubstantial."

The Fourth Circuit, in *Duckworth*, did not disagree with that basic framework. Its mistake, instead, was holding that a claim is "insubstantial" (and that jurisdiction is therefore lacking) when it fails to state a claim under Rule 12(b)(6). That holding is flatly inconsistent with this Court's precedents, and thus also with what Congress would have understood the words "not required" to mean when it amended the Act in 1976.

Unable to defend the Fourth Circuit's holding on its own terms, respondents now offer an entirely new and even more troubling approach. In their view, Section 2284(b)(1)'s requirement that the single-judge district court determine whether "three judges are not required" does not call for application of the substantiality standard at all and instead invites single-judge district courts to rule on motions to dismiss, apparently as a matter of discretion.

There is no basis in the statutory text for such a radical departure from historical practice. In fact, the plain language expressly forbids it—it says that, when the statutory prerequisites are satisfied, "[a] district

court of three judges *shall* be convened." 28 U.S.C. § 2284(a) (emphasis added). Few rules of statutory interpretation are more fundamental than the maxim that "the word 'shall' admits of no discretion." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1651 (2015).

Respondents have little else to say in defense of the Fourth Circuit's *Duckworth* decision. They offer no meaningful response to our argument (Pet. Br. 22-23) that Congress is presumed to have been aware of this Court's precedents when it used the words "not required" in the 1976 amendment. And while respondents strain to show that their interpretation of the statutory language is more consistent with the Act's settled purposes (Resp. Br. 25-40), they fail to grapple with the myriad complications that follow when single-judge courts are permitted to dismiss on the merits.

In the end, there is no doubting that the *Duckworth* rule—whether on its own terms or reframed as respondents now suggest—is inconsistent with both the statutory text and the Act's clear purposes. The judgments below accordingly should be vacated.

A. Three judges are "not required" only when the statutory preconditions are absent or when the court lacks jurisdiction

1. The statutory language could hardly be clearer: "A district court of three judges *shall* be convened *when*" such a court is either "required by Act of Congress" or "an action is filed challenging the constitutionality of the apportionment of congressional [or statewide legislative] districts." 28 U.S.C. § 2284(a) (emphasis added). It follows that "three judges are not required" (*id.* § 2284(b)(1)) when those conditions are not met: when the lawsuit does not bring a constitutional challenge to the apportionment of congressional or

legislative districts and is not otherwise one required by act of Congress to be heard by a three-judge court.

As we explained in our principal brief (at 19), this Court has recognized a second circumstance in which a single-judge court may decline to convene a three-judge court: "when the district court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts." *Gonzalez* v. *Automatic Emp. Credit Union*, 419 U.S. 90, 100 (1974) (citing *Ex parte Poresky*, 290 U.S. 30, 31 (1933)). And one ground for holding that a claim is "beyond the jurisdiction of the District Court" and subject to dismissal without a three-judge panel is that the claim is "insubstantial." *Hagans* v. *Lavine*, 415 U.S. 528, 539 (1974). Accord *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500, 513 n.10 (2006).

Apart from those two circumstances—that is, when (1) the complaint *is* of the sort identified in Section 2284(a) and (2) there are *no* impediments to federal jurisdiction—review by a three-judge court is mandatory. That follows inescapably from Congress's use of the word "shall," which "admits of no discretion." *Mach Mining*, 135 S. Ct. at 1651.

Respondents point (Resp. Br. 23) to *Dolan* v. *United States*, 560 U.S. 605 (2010), as suggesting that the word "shall" actually means "may." Respondents misread that case. *Dolan* involved a statute that required the district court to act within a certain time period. *Id.* at 607-608. The question was whether a court's failure to act within the prescribed timeframe divested it of authority to act beyond the "missed statutory deadline." *Id.* at 611-612. The Court held that although the word "shall" made a court's duty to act before the deadline "mandatory," it did not spell "'loss of all later powers to act'" subsequently. *Id.* at 612 (quoting *United States* v. *Montalvo-Murillo*, 495

U.S. 711, 718-719 (1990)). That holding does nothing to suggest that Congress's use of the word "shall" in Section 2284(a) leaves wiggle room for a single-judge court to decline to convene a three-judge court when the statutory prerequisites are met and jurisdiction is present.

2. Respondents observe (Resp. Br. 17, 21) that "Congress * * * did not [expressly] prescribe that district court judges employ the 'insubstantiality' standard," although it "could have easily done so" and has done so in other statutes. They likewise note (*id.* at 20) that Congress did not expressly "limit the scope of the district court's review to a determination that the district court lacks subject matter jurisdiction."

That misses the point. As we noted in our principal brief (at 19-20), this Court stated—just two years before the 1976 amendment—that "[a] three-judge court *is not required* when the district court itself lacks jurisdiction of the complaint." *Gonzalez*, 419 U.S. at 100 (emphasis added). And by 1976, it was "unexceptionable under prior cases" of this Court "that a 'substantial' question was necessary to support jurisdiction." *Hagans*, 415 U.S. at 536. Thus, the Court explained, the Act "*does not require* the convening of a three-judge court when the constitutional attack upon the state statutes is insubstantial." *Goosby* v. *Osser*, 409 U.S. 512, 518 (1973) (emphasis added).

That was how matters stood when Congress added the words "unless he determines that three judges are not required" in 1976. See Pub. L. No. 94-381, § 3, 90 Stat. 1119 (Aug. 12, 1976). It would blink reality to say that Congress did not understand in enacting the 1976 amendment that the only accepted grounds for holding that "three judges are not required" under prior versions of the Act were that (1) the statutory criteria are

not satisfied or (2) the court lacks jurisdiction, including when the underlying claims are insubstantial.

That ought to be an end to the matter. This Court's "evaluation of congressional action in [1976] must take into account its contemporary legal context." *Cannon* v. *U. of Chicago*, 441 U.S. 677, 698-699 (1979). "[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with * * * [this Court's] precedents * * * and that it expected its enactment to be interpreted in conformity with them." *Id.* at 699. There are no "contrary indications" to suggest otherwise. *Marshall* v. *Marshall*, 547 U.S. 293, 307 (2006). We made that point in our principal brief (at 22), but respondents ignore it.

Respondents are, for similar reasons, wide of the mark when they insist (Resp. Br. 20) that "Congress chose not to prescribe any particular standard [for] * * * determining whether three judges are not required." No express statement of a "standard" was necessary—it was crystal clear then (and remains so now) that three judges are "not required" only when the statutory criteria are not met or jurisdiction is lacking. We are unaware of any case decided at any time in the century-long history of the Three-Judge Court Act to suggest otherwise.[1] And respondents' alternative

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[1] Respondents say (Resp. Br. 39-40) that this Court's precedents more broadly held that three judges are not required when the reasons justifying a three-judge court are "inapplicable." That is manifestly wrong. In *Swift & Co.* v. *Wickham*, the Court held that statutory preemption claims are not "constitutional" claims within the meaning of the statute. 382 U.S. 111, 126-129 (1965). And in *Bailey* v. *Patterson*, the Court held that three-judge court review is not required when the State's constitutional defense, like a plaintiff's claim, "is foreclosed as a litigable issue." 369 U.S. 31, 33 (1962). Neither of those holdings suggests that a single-judge court may rule on a Rule 12(b)(6) motion to dismiss.

theory—that the Act imposes no standard at all, leaving the question whether three judges are "required" to the unchecked discretion of singular judges—finds support in neither the statutory text nor common sense.

B. When a complaint comes within the requirements of the Act, Section 2284(a) divests single-judge courts of jurisdiction to decide the merits

In holding that single-judge courts may decide 12(b)(6) dismissal motions in cases covered by Section 2284, the Fourth Circuit did not purport to reject the framework we have just described. Its mistake—one that not even respondents here defend—was conflating the insubstantiality standard with the standard for a 12(b)(6) motion to dismiss. See *Duckworth* v. *State Admin. Bd. of Election Laws*, 332 F.3d 769, 772-773 (4th Cir. 2003). This Court long ago held that those two standards are distinct: Because failure to state a claim calls for a judgment on the merits, and because a judgment on the merits requires the court to have jurisdiction, the grant of a Rule 12(b)(6) motion *assumes* jurisdiction and cannot be a basis for finding it lacking. *Bell* v. *Hood*, 327 U.S 678, 682 (1946). The Fourth Circuit's contrary holding was erroneous and should be corrected.

1. Respondents now offer an alternative route for reaching the same improbable conclusion as the Fourth Circuit—one that they did not present in their brief in opposition or at any other point in this litigation.

Their reasoning goes like this: As of 1976, Section 2284(b)(1) provides that the process for calling a three-judge court commences "[u]pon the filing of a request for three judges." The parties may therefore "ch[oose] to forgo a three-judge court" by declining to file such a

request. Resp. Br. 18. That means that review before a three-judge court is waivable—and because it is waivable, that the statute is non-jurisdictional. *Ibid.* From there, respondents leap to the conclusion that Congress "[did] not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits." Resp. Br. 24.[2]

That line of reasoning ignores nearly a century of this Court's precedents holding that the Three-Judge Court Act *is* jurisdictional: "[A] single judge has no jurisdiction to entertain a motion to dismiss [a] bill on the merits" in a case covered by the Act. *Stratton* v. *St. Louis Sw. Ry.*, 282 U.S. 10, 15 (1930). Thus, the question whether "a three-judge court [is] inappropriate" is a "jurisdictional question." *Swift*, 382 U.S. at 124. And when a complaint presenting a substantial federal claim "comes within the requirements of the three-judge statute, * * * the applicable jurisdictional statute * * * ma[kes] it impermissible for a single judge to decide the merits of the case, either by granting or by withholding relief." *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962). Thus, a single-judge court "invade[s] the province of a three-judge court" when it "decide[s] the merits of the case, either by granting or by withholding relief." *Id.* at 718.

There is nothing fuzzy about those holdings: The Three-Judge Court Act is jurisdictional, and when the prerequisites for convening a three-judge court are satisfied, the single-judge court loses jurisdiction over the merits of the case.

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[2] Respondents also describe Section 2284 as "procedural" rather than "substantive." See Resp. Br. 24. We do not disagree—but nothing here turns on that distinction.

Nor do those holdings deserve revisiting. Under this Court's more recent teachings, the question whether a statute is jurisdictional asks whether the statute "'delineat[es] the classes of cases'" that a court has "adjudicatory authority to determine." *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 160-161, 164 (2010). That is just what the Three-Judge Court Act does—it delineates a class of cases that three-judge district courts are authorized (and, indeed, required) by statute to adjudicate: "A district court of three judges shall be convened" to decide all actions that, among other things, "challeng[e] the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). The clear implication of the statute's mandatory language, moreover, is that a single-judge court is without authority to adjudicate cases reserved for three-judge courts—such cases *shall* be heard by a court of three judges.[3]

2. Undeterred, respondents point to a change in the statutory language, insisting that Congress's insertion of the words "[u]pon the filing of a request for three judges" makes review by a three-judge district court "waivable" and therefore "non-jurisdictional." Resp. Br. 17-19. Their theory seems to be that the waivability of three-judge court review means that "shall" doesn't really mean "shall"—that, because the statute permits parties to "waive" a court of three judges in cases otherwise covered by the terms of Section 2284(a), "the statute does not [actually] require

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[3] That has been the conclusion of every court of appeals to consider the question since the 1976 amendment: Single-judge courts "lack jurisdiction to decide" cases that "properly belong[] before a three-judge district court." *LaRouche* v. *Fowler*, 152 F.3d 974, 981 (D.C. Cir. 1998). Accord *Kalson* v. *Paterson*, 542 F.3d 281, 287 (2d Cir. 2008); *Page* v. *Bartels*, 248 F.3d 175, 184 (3d Cir. 2001).

that the district court convene a three-judge court to decide the merits of every [such] case." Resp. Br. 13. That is both irrelevant and wrong.

It is *irrelevant* because petitioners here *did* request three judges. See Opp. App. 31 ¶ 6. The question whether an express request for three judges is an indispensable prerequisite to the convocation of a three-judge court makes no difference here. Respondents give no reason to think that the supposed waivability of a three-judge court means that a single-judge court may disregard a request for three judges when one is duly made.

It is *wrong* because the statutory text does not prohibit single-judge courts from convening three-judge courts *sua sponte*. To be sure, it describes "the filing of a request for three judges" as one trigger for commencing the procedure for convening a three-judge court. 28 U.S.C. § 2284(b)(1). But it does not say that such a request is the *exclusive* trigger, nor does it otherwise prohibit single-judge courts from convening three-judge courts on their own motions.

Even if an express request were an inflexible precondition for convening a three-judge court, it would not follow that Section 2284 is non-jurisdictional. Under respondents' reasoning, 28 U.S.C. § 1291, which confers jurisdiction on the federal courts of appeals to hear appeals from final judgments of federal district courts, would be non-jurisdictional. After all, 28 U.S.C. § 2107 requires appellants to file a timely notice of appeal to invoke the appellate court's jurisdiction under Section 1291. By respondents' lights, because the filing of such a notice "can be waived," Section 1291 must be "non-jurisdictional." Resp. Br. 13.

That makes no sense. When a party fails to check all of the boxes for invoking the exclusive jurisdiction

of a federal court (say, by filing a notice out of time or not at all), the answer is to dismiss the case for lack of jurisdiction, not to deny the jurisdictional nature of the statute. Although the Court "must not give jurisdictional statutes a more expansive interpretation than their text warrants, * * * it is just as important not to adopt an artificial construction that is narrower than what the text provides." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). Precisely so here.

C. Respondents' interpretation of Section 2284(b)(1) makes nonsense of the statutory scheme

We showed in the principal brief (at 25-27) that permitting single-judge courts to decide the merits of cases covered by Section 2284(a) would upend the statutory scheme, for two reasons. *First*, if a single-judge court can decide that "three judges are not required" because it elects to enter judgment on the merits itself, Section 2284(b)(3)'s exclusive allocation of authority to three-judge panels to "enter judgment on the merits" would be frustrated. *Second*, because Section 1253 assigns jurisdiction over appeals from judgments of three-judge district courts to this Court alone, "a court of appeals [is] precluded from reviewing on the merits a case which should have originally been determined by a court of three judges." *Idlewild*, 370 U.S. at 715-716. Yet allowing single-judge courts to find three judges "not required" under Rule 12(b)(6) will require the courts of appeals to decide the merits of cases even when they determine that a three-judge court should have been convened.

Respondents ignore our second point altogether. And as to the first point, they note only that Section 2284(b)(3) "pertains to cases being heard by three

judges." Resp. Br. 24. That is exactly right. Our point is that Section 2284(b)(3)'s allocation of responsibility, applicable only when three judges are convened, would be a dead letter if a single judge could decline to convene three judges on the very grounds that he or she otherwise would be forbidden by Section 2284(b)(3) from deciding. Respondents offer no response to that commonsense observation.

* * *

At bottom, respondents propose a complete overhaul of the Three-Judge Court Act and the Court's precedents interpreting it. They ask this Court to (1) substitute the word "may" for the word "shall," (2) insert the word "only" before the phrase "upon the filing of a request," (3) disrupt the statutory scheme, and (4) overrule a century of precedent holding that the Act is jurisdictional. But this Court cannot rewrite statutes, and "[o]verruling precedent is never a small matter." *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). If respondents truly believe that traditional single-judge district courts should have discretion to decide the merits of cases covered by Section 2284, they must "take their objections across the street, [to] Congress." *Ibid.*

D. Respondents' interpretation of Section 2284(b)(1) disserves the statute's purposes

We demonstrated in our principal brief (at 29-34) that our reading of Section 2284 better accords with the statute's purposes to "assure more weight and greater deliberation by not leaving the fate of [important] litigation to a single judge" (*Phillips* v. *United States*, 312 U.S. 246, 250 (1941)) and "to minimize the delay incident to a review upon appeal from an order granting or denying an * * * injunction" (*Stratton*, 282 U.S. at 14).

Respondents offer two responses. *First*, they assert without explanation (Resp. Br. 32) that "[f]orcing a State to litigate in front of a three-judge court * * * subject[s] the State to far greater inconvenience" than allowing it to litigate in front of a single-judge court. That is nonsense. Whether a case is decided by one judge or three has no impact on how it is litigated; it affects only who must decide the merits. If anything, three-judge-court review reduces the burdens on the parties by cutting out intermediate appellate review in the courts of appeals. 28 U.S.C. § 1253.

Respondents likewise exaggerate when they assert (Resp. Br. 34-35) that more frequently avoiding three-judge-court review would promote judicial efficiency. Although the Three-Judge Court Act may have imposed a "severe burden" on the courts early in its history (Resp. Br. 28 (quoting *Ex parte Collins*, 277 U.S. 565, 569 (1928)), that is hardly true any longer. Single judges are now empowered by Section 2284(b)(3) to handle the day-to-day minutiae of cases without convening the full panel, and modern air travel and video-conferencing technology make convening three judges easy for hearings on dispositive motions and trial.

Plucking a single statement from a century-old volume of the Congressional Record (Resp. Br. 27), respondents assert, *second*, that the Act actually has just one purpose: "to protect the States" from "a single federal judge * * * usurping a State's authority" (Resp. Br. 29). And that sole purpose is best served, respondents maintain, by permitting single-judge courts to dismiss Section 2284 cases on the merits, without calling a three-judge court. *Id.* at 26-33. Respondents' premise and conclusion are both wrong.

Concerning the *premise*: If all Congress intended to accomplish with the 1976 amendments was to save

States from improvident injunctions entered by imperious federal judges, it would have provided for direct appeals to this Court only from *grants* of injunctions. It did not. Section 1253 says that "any party may appeal to the Supreme Court from an order granting *or denying* * * * [an] injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added). That is clear evidence that Congress intended careful and speedy review in *all* cases like this one, regardless of whether such review serves the interests of plaintiffs when relief is denied, or of the States when relief is granted.

Respondents' cramped view of the statute's purposes also fails to account for cases other than challenges to congressional or legislative reapportionments. 28 U.S.C. § 2284(a). With respect to the Bipartisan Campaign Reform Act of 2002, for example, Congress's purpose in providing three-judge court review could not possibly have been to "protect[] the States from imprudent actions by the federal courts" (Resp. Br. 28). No, lawmakers were concerned to ensure "prompt and definite determination of the constitutionality of many of the bill's controversial provisions' and to "afford the Supreme Court the opportunity to pass on the constitutionality of this legislation as soon as possible." 147 Cong. Rec. S3189 (2001) (statement of Sen. Hatch). Respondents do not argue that their rule serves those purposes, nor do they assert that different rules should apply in suits not involving requests for injunctions against the enforcement of state laws. That leaves them without an answer to such cases.

Concerning the *conclusion*: There is, in any event, no reason to think that respondent's reading of the statute better protects States from improvident injunctions. To begin with, the logic of respondents' statutory

reading does not stop at a single-judge court's authority to *grant* a motion to dismiss; if respondents were correct that the "waivability" of the statute means that it "does not broadly prohibit a single district judge from ever dismissing a reapportionment challenge on the merits" (Resp. Br. 24), there is no principled reason to think that it would not also allow a single judge to *deny* a motion to dismiss or enter an injunction.

Moreover, if Congress had in mind solely to protect the interests of States in cases where injunctions are sought, it would have done away with three-judge-court review altogether. That is because, by 1976, the "three-judge district court, as compared to single district judges, [had become] *more* favorable to civil rights plaintiffs overall." Michael E. Solimine, *Congress,* Ex Parte Young, *and the Fate of the Three-Judge District Court*, 70 U. Pitt. L. Rev. 101, 129 (2008) (emphasis added). Thus, as the legislative history of the Voting Rights Act demonstrates, Congress understood that a hearing before three judges ensures "a *greater* willingness to safeguard the individual's right to vote." H.R. Rep. No. 88-914, at 2491 (1964), as reprinted in 1964 U.S.C.C.A.N. 2391 (emphasis added). We made this point in our principal brief (at 30-31 & n.6), and respondents again ignore it.

E. Respondents' rule is unworkable

Respondents assert that their standardless rule is "more workable" (Resp. Br. 26) than the rule that has governed three-judge court cases since 1976 and many decades before then. But it is unclear how respondents' rule would work *at all*.

If a single district judge determined in his or her discretion that "three judges are not required" in a reapportionment challenge and went on to dismiss the complaint on the merits under Rule 12(b)(6), what

would be the consequence of a reversal by the court of appeals? Would it follow from such a reversal that three judges were, in fact, required? If so, would the three-judge court be bound by the decision of the court of appeals on the 12(b)(6) question? If it does not follow that three judges are required, could the single district judge go on to enter summary judgment or try the case? And when a single district judge decides that three judges *are* required, could the defendants argue on appeal to this Court that the judge abused his or her discretion under respondents' theory? Would that not become a threshold question in every case appealed to this Court under Section 1253?[4]

And what, anyway, would be the standard for deciding when three judges are required and when they are not? Respondents here propose none at all; they offer only the truism that "[t]he plain text of the statute permits a single judge to determine * * * that 'three judges are not required'" (Resp. Br. 21) and suggest that *one* ground for finding three judges unnecessary is the complaint's failure to state a claim (Resp. Br. 31, 40). But when else might three judges be "not required"? Respondents propose no way to tell.

Surely any standard is better than none. Congress and this Court have, over the past 100 years, established a perfectly workable scheme for administering the Three-Judge Court Act. The scheme is perhaps not

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[4] Respondents mistakenly claim (Resp. Br. 36) that we conflated a single judge's conclusion that three judges are not required with a three-judge court's decision on the merits. There is no mistaking that, under *Duckworth*, Rule 12(b)(6) governs both whether a three-judge court is required and whether a complaint states a claim. Thus, when a three-judge court holds that a complaint fails to state a claim, it should (under *Duckworth*) dissolve as having not been required in the first place.

flawless. But if the Court's concern is to encourage predictable and "straightforward" jurisdictional rules (*Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)) and "efficient operation of the lower federal courts" (*Swift*, 382 U.S. at 128), there is little question that it should not adopt respondents' late-developed approach, which would overturn a century of settled practice (see Petr. Br. 31-34) and create far greater confusion and uncertainty than it resolves.

F. Petitioners have stated a substantial First Amendment claim

Respondents finally assert (Resp. Br. 41) that "the Court should affirm the dismissal of the petitioners' complaint because it is insubstantial." That is wishful thinking.

1. Respondents' primary argument—also one that did not appear in their opposition brief and was not presented to or decided by Judge Bredar—is not really that the First Amendment claim is insubstantial, but that it is nonjusticiable. To be sure, they say that "the First Amendment claim [cannot be separated] from the rest of the complaint," and that it is therefore "*insubstantial* for the same reasons that [the] other claims * * * are insubstantial." Resp. Br. 41-42 (emphasis added). But the other claims were dismissed for lack of justiciability, not substantiality. See Pet. App. 20a. Elsewhere, respondents say more straightforwardly that there is no "standard" for evaluating the First Amendment claim. See, *e.g.*, Resp. Br. 45.

Those assertions misunderstand our First Amendment theory. To begin with, the First Amendment claim is unambiguously distinct from the complaint's other claims. Petitioners alleged that, "*in addition to* infringement of representational and voting rights, we also claim that" various features of Maryland's reap-

portionment map "constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in 2008." Opp. App. 31 (¶ 5) (emphasis added). For that reason—because Maryland's reapportionment map "most particularly impacts only areas with highly Republican voting history"—it "*also* constitutes [a] violation of the First Amendment's protection of political association[,] along the lines suggested by Justice Kennedy in his concurrence in *Vieth*." *Id.* at 44 (¶ 23) (emphasis added). That is a standalone claim.[5]

The distinction is critical because the First Amendment claim marks a difference not just in labels, but in *what* is being measured and *how* to measure it. As we explained in the principal brief (at 35-38), a First Amendment challenge to political gerrymandering is best analogized to the First Amendment retaliation doctrine. The question, under such a theory, is not whether the map or any particular district is so contorted as to raise a constitutional eyebrow. Nor is the underlying injury the abstract harm to representative democracy that a gerrymandered map inflicts—this is not an "I know it when I see it" theory of gerrymander-

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[5] Any uncertainty about that (and there should be none) would be resolved by the fact that the complaint here was filed *pro se*. "A document filed *pro se* is 'to be liberally construed,' and 'a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers,'" so "'as to do substantial justice.'" *Erickson* v. *Pardus*, 551 U.S. 89, 94 (2007) (per curiam) (citations omitted) (quoting *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) and Fed. R. Civ. P. 8(f)). Beyond that, "Rule 15(a) declares that leave to amend 'shall be freely given when justice so requires.'" *Foman* v. *Davis*, 371 U.S. 178, 182 (1962). If the Court remands to the district court, an amended complaint by counsel is a sure thing.

ing (see *Karcher* v. *Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring)).

The questions, instead, are: When a state legislature shifts a block of voters from one district to another, does it do so with an intent to penalize those voters for their prevailing political-party affiliation or voting history? And if retaliation for protected First Amendment conduct *was* a principal motivating factor in the legislature's decision, does the legislature have a constitutionally permissible justification for its action, "including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests" (*Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) (racial gerrymandering))?[6] Those questions drive at a settled principle: "'[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes * * * or to evade important constitutional restraints'" on state action. *Cook* v. *Gralike*, 531 U.S. 510, 523 (2001).

Measuring legislative motivation is a task familiar to the courts. In racial gerrymandering cases, for example, the question is whether a reapportionment law "purposefully distinguishes between voters on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 646 (1993). Of course, "[t]he distinction between being aware of [impermissible] considerations and being motivated by them may be difficult to make," and in light of "the sensitive nature of redistricting and the presumption of

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[6] In the related context of direct regulatory burdens on First Amendment conduct, the Court similarly weighs "the burden the State's rule imposes * * * against the interests the State contends justify that burden." *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997).

good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims" like the one at issue here. *Miller*, 515 U.S. at 916. Nevertheless, the question whether First Amendment retaliation "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (*ibid.*) is a familiar question that brings along a manageable decisional framework.

We laid all of this out in the opening brief (at 35-39); respondents again pretend that we did not.

2. Respondents also assert that the First Amendment claim is insubstantial. First, they say that we have conceded that a redistricting plan, taken alone, "does not deny" anyone the right to "'associate and to form political parties for the advancement of common political goals and ideas.'" Resp. Br. 47 (quoting *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 357 (1997)). That, again, misunderstands our theory. First Amendment retaliation does not entail a direct limitation on the exercise of free speech or association; on the contrary, it entails retribution *for* the exercise of free speech or association.

Thus, the passage that respondents cite shows that petitioners vigorously pressed their First Amendment claim in the district court: Petitioners argued that, *regardless that* "Republican voters in the challenged districts may be active in political committees, express their views, and influence their Representatives," their voices "have been intentionally muted by the challenged actions." Resp. Br. App. 2-3 (¶ 60); accord *id.* at 2 (¶ 60) (stating that "[w]e expressly disagree with Defendants' that Maryland's reapportionment map

"has no impact on our First Amendment rights"). That is the opposite of a concession or waiver.[7]

3. Respondents also suggest that the First Amendment claim is insubstantial "'because injunctive relief is otherwise unavailable'" in light of a fifteen-month delay in filing. Resp. Br. 49 (quoting *Simkins* v. *Gressette*, 631 F.2d 287 (4th Cir. 1980)). As we explained in our certiorari-stage reply brief (at 8-9), however, courts frequently enter injunctive relief after delays of that length. See, *e.g.*, *Johnson* v. *Miller*, 864 F. Supp. 1354 (S.D. Ga. 1994), aff'd, 515 U.S. 900 (1995). And regardless, the propriety of injunctive relief is an issue for the district court in the first instance. See *Holland* v. *Florida*, 560 U.S. 631, 654 (2010).

4. Finally, Respondents cite the summary affirmance in *Anne Arundel County Republican Central Committee* v. *State Administrative Board*, 504 U.S. 938 (1992) (Mem.), and the decision in *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399 (2006) ("*LULAC*"), as support for their assertion that the First Amendment claim is insubstantial. See Resp. Br. 47-49. But respondents' contentions based on those cases are quintessential 12(b)(6) arguments. Though we do not concede that they get respondents even this far, the

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[7] Respondents likewise accuse us of "abandon[ing]" our other claims (Resp. Br. 42) and of "appear[ing] to concede [those claims] are insubstantial" (*id.* at 45). That is mistaken. We did not press the complaint's other claims in the petition for certiorari because they were dismissed as nonjusticiable and therefore were not implicated by the question presented. See Pet. 9 n.2. But we have been clear all along that we believe those claims should be referred, alongside the First Amendment claim, to a three-judge district court. See Pet. 29 n.12, Petr. Br. 39. We certainly never conceded that the complaint's other claims are insubstantial or that they were properly dismissed as nonjusticiable. Cf. Petr. Br. 20 n.2. They are not and were not.

most those cases might do is show that the claim is of "doubtful or questionable merit." *Goosby*, 409 U.S. at 518. That is not the standard: "[P]revious decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of [the Three-Judge Court Act]." *Ibid.*

Against this backdrop, it is simply wrong to say that this Court's precedents render the First Amendment claim so "obviously frivolous" and so "obviously without merit" as to "leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby*, 409 U.S. at 518. In fact, the opposite is true—Justice Kennedy's opinion in *Vieth*, which respondents do not deny is the controlling opinion in that case (see Petr. Br. 36 n.9), strongly supports the claim. See Petr. Br. 36-37.

CONCLUSION

The judgements below should be vacated, and the case should be remanded with instructions to convene a three-judge district court.

Respectfully submitted.

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No. 14-990

In the Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA
Petitioners,

v.

BOBBIE S. MACK AND LINDA H. LAMONE,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Respondents do not deny that the Fourth Circuit's holding in *Duckworth* conflicts with both this Court's precedents and the binding decisions of every other court of appeals to confront the issue. Respondents likewise do not dispute that proper resolution of the question presented is a matter of enormous practical significance—not only because it recurs frequently, but also because the cases in which it arises involve issues of special importance. In fact, respondents' brief says almost nothing at all to refute the many arguments that both we and *amicus curiae* Judicial Watch made in support of further review.

What little respondents do say is unpersuasive. Curiously, they dedicate nearly half of their opposition brief to describing (at 2-6) and responding (at 11-14) to several constitutional claims that we expressly declined to raise in the petition. See Pet. 9 n.2. Beyond that, respondents say only that this case is an inappropriate vehicle for resolving the question presented because the First Amendment claim is frivolous and was filed late. Opp. 14-16. But those assertions do not withstand the slightest scrutiny. Review is therefore warranted.

A. The opposition responds, in the main, to issues not presented in the petition

The only claim presently before this Court is petitioners' First Amendment claim, which is the sole claim that the single-judge district court dismissed on the merits under the traditional Rule 12(b)(6) framework. In noting that the district court dismissed other of petitioners' claims as non-justiciable, we stated expressly that "the court's justiciability hold-

ing [is] not subject to challenge here." Pet. 9 n.2. Respondents' nearly singular focus on those other claims (Opp. 2-6, 11-14) is simply off-target.

Respondents also seem to imply that review is unwarranted because this Court already approved the constitutionality of Maryland's redistricting map with its summary affirmance in *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011). See Opp. 1, 14. That is similarly wide of the mark. The plaintiffs in *Fletcher* did not bring a First Amendment claim. See *Fletcher*, 831 F. Supp. 2d at 892. Their jurisdictional statement before this Court, in particular, presented a one-person-one-vote challenge concerning incarcerated voters. See Juris. Statement at i, *Fletcher* v. *Lamone* (No. 11-1178). And the district court below properly rejected respondents' res judicata argument. Pet. App. 9a-12a. There is therefore no reason to think that the summary affirmance in *Fletcher* presents an obstacle to further review in this case.

B. This case cleanly presents an important question that has divided the lower courts

1. Respondents do not deny that the question presented here—whether a single judge's conclusion that a complaint fails to state a claim under Rule 12(b)(6) is a sufficient ground for that judge to hold that "three judges are not required" within the meaning of 28 U.S.C. § 2284(b)(1)—has divided the circuits. Nor could they. In square conflict with the D.C., Fifth, and Seventh Circuits (and in substantial tension with the Second and Third Circuits), the Fourth Circuit held that, when a single judge unilaterally concludes that a plaintiff's "pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court without convening a three-judge

court." *Duckworth* v. *State Admin. Bd. of Elec. Laws*, 332 F.3d 769, 772-773 (4th Cir. 2003).

Respondents also offer no reason to doubt that the Fourth Circuit's answer to that question was dispositive of petitioners' First Amendment claim. Again, nor could they. Respondents—invoking both *Duckworth* and the plausibility standard described in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009)—argued before the district court that three judges were not required with respect to petitioners' First Amendment claim because the claim is not "plausible" and thus should be dismissed under Rule 12(b)(6). See Mem. in Support of Defs' Opp. to Pls' Request for Three-Judge Panel and Mot. to Dismiss 4, 24-25 (Dkt. 13-2).

The single-judge district court agreed. Pet. App. 20a-21a. It thus dismissed the First Amendment claim without referring the matter to a three-judge court—not because it deemed the claim "obviously frivolous" or "obviously without merit" in light of the previous decisions of *this* Court (*Goosby* v. *Osser*, 409 U.S. 512, 518 (1973)), but because it determined that "[p]laintiffs' claim under the First Amendment is not one for which relief can be granted" in light of decades-old precedents of the District of Maryland and the Fourth Circuit. Pet. App. 20a-21a.

There is thus no disputing that the dismissal of petitioners' First Amendment claim turned entirely on the Fourth Circuit's conflation in *Duckworth* of the constitutional substantiality standard with the Rule 12(b)(6) plausibility standard.

2. Respondents nevertheless insist (Opp. 9) that this is a "poor vehicle" for addressing the question presented "because the petitioners' claims are insubstantial" and bound to be dismissed "irrespective of

how the Court might answer the question" presented in the petition.

We note, as an initial matter, that the Court (if it prefers) need not reach the issue of whether petitioners' First Amendment claim is a substantial one, since it arises subsequent to the Section 2284 question presented in the petition. See, *e.g.*, *Fitzgerald* v. *Barnstable Sch. Comm.*, 555 U.S. 246, 260 (2009) (remanding for the district court to decide all subsequent questions in the first instance).

Regardless, the issue is easily resolved in petitioners' favor. As we explained in the petition (at 27-28), Justice Kennedy's controlling opinion in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), confirms that citizens have a First Amendment right not to be "burden[ed] or penaliz[ed]" for their "participation in the electoral process," their "voting history," their "association with a political party," or their "expression of political views." *Id.* at 314 (citing *Elrod* v. *Burns*, 427 U.S. 347 (1976) (plurality) and *California Democratic Party* v. *Jones*, 530 U.S. 567, 574 (2000)). Thus, "First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views." *Ibid.* (Kennedy, J., concurring in the judgment).[1]

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[1] Respondents do not dispute that Justice Kennedy's opinion is controlling under *Marks* v. *United States*, 430 U.S. 188 (1977). The lower courts agree. See, *e.g.*, *Alperin* v. *Vatican Bank*, 410 F.3d 532, 552 n.13 (9th Cir. 2005); *Perez* v. *Perry*, 26 F. Supp. 3d 612, 623 n.6 (W.D. Tex. 2014); *Ala. Leg. Black Caucus* v. *Alabama*, 988 F.Supp.2d 1285, 1295 (M.D. Ala. 2013).

We also pointed to this Court's ballot-access cases (Pet. 28-29), which have held that "[a] burden that falls unequally on [particular] political parties * * * impinges, by its very nature, on associational choices protected by the First Amendment." *Anderson* v. *Celebrezze*, 460 U.S. 780, 793 (1983). Thus, it is a violation of "First Amendment interests in ensuring freedom of association" for the State to "impose burdens on new or small political parties" in a way that, in effect, penalizes individuals' "association with particular political parties." *Clements* v. *Fashing*, 457 U.S. 957, 964-965 (1982).

Even absent the liberal construction to which it is entitled, petitioners' *pro se* amended complaint plainly states a viable First Amendment claim based on those theories. It describes how Maryland's redistricting map, by design, split geographic regions with "similarity of political views," thereby "marginaliz-[ing]" the votes of those regions' residents on the basis of their past political affiliations and voting histories. Opp. App. 43 ¶ 22. And it alleges that the resulting "abridgement [of representational rights] most particularly impacts only areas with highly Republican voting history" and thus "constitutes violation of the First Amendment's protection of political association." Opp. App. 44 ¶ 23.

Against this backdrop, it would blink reality to say that the "unsoundness" of petitioners' First Amendment claim (assuming, contrary to fact, that it is unsound *at all*) "so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby*, 409 U.S. at 518.

3. Respondents do not directly respond to any of this. Instead—relying on a summary affirmance that predates *Vieth* by more than a decade—they appear to suggest (Opp. 14) that *Anne Arundel County Republican Central Committee* v. *State Administrative Board of Election Laws*, 781 F. Supp. 394 (D. Md. 1991), aff'd 504 U.S. 938 (1992), is a prior decision of this Court that inescapably renders petitioners' First Amendment claim frivolous.

That is wrong in two separate respects. To begin with, it is well settled that summary affirmances do not have the same weight under *stare decisis* "as do decisions rendered after plenary consideration." *Metromedia, Inc.* v. *San Diego*, 453 U.S. 490, 500 (1981). Respondents accordingly acknowledge (Opp. 14) that summary dispositions are "not binding on this Court." Thus, to the extent that the summary affirmance in *Anne Arundel* is inconsistent with *Vieth*, it is *Vieth*—the later decision, rendered after full briefing and argument—that controls.

In any event, *Anne Arundel* is not adverse precedent here. That is because "'[a]n unexplicated summary affirmance settles the issues [only] for the parties'" and cannot be understood as an adoption or renunciation of any broader legal principles. *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977) (quoting *Fusari* v. *Steinberg*, 419 U.S. 379, 391-392 (1975) (Burger, C.J., concurring)). Whatever limited precedential effect a summary affirmance may have, therefore, it "extend[s] no further than 'the precise issues presented and necessarily decided by [this Court in] those actions.'" *Illinois State Bd. of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 182 (1979) (quoting *Mandel*, 432 U.S. at 176).

That being so, even the Fourth Circuit has recognized the precedential limits of *Anne Arundel*, holding in *Duckworth* itself that, when a district court is "presented with new allegations" concerning "a *different* apportionment plan," the prior decision in *Anne Arundel* cannot "foreclose[]" relief. 332 F.3d at 773. That same reasoning applies here—particularly because it is unclear whether the plaintiffs' First Amendment claim (which was dismissed by the district court in a mere three sentences (781 F. Supp. at 401)) was even pressed before this Court in the jurisdictional statement in *Anne Arundel*.

In explaining that "constitutional claims will not lightly be found insubstantial for purposes of 2281" this Court has admonished that "prior decisions are not sufficient to support a conclusion that certain claims are insubstantial unless those prior decisions 'inescapably render the claims frivolous.'" *Washington* v. *Confederated Tribes*, 447 U.S. 134, 147-148 (1980) (quoting *Goosby*, 409 U.S., at 518). Both on its own terms and in light of *Vieth*, the summary affirmance in *Anne Arundel* does not come close to meeting that exacting standard with respect to petitioners' First Amendment claim.[2]

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[2] The Fourth Circuit's and District of Maryland's respective decisions in *Washington* v. *Finlay*, 664 F.2d 913 (4th Cir. 1981), or *Duckworth* v. *State Board of Elections*, 213 F. Supp. 2d 543 (D. Md. 2002), are equally unhelpful to respondents because those cases are not "previous decisions of this court" (*Goosby*, 409 U.S. at 518) and likewise predate *Vieth*.

C. Concern for avoiding delay in cases like this one weighs in favor of granting immediate review

Respondent finally asserts (Opp. 14) that injunctive relief will be unavailable, and that the "policies underlying the three-judge district court statute would be ill-served by granting further review," because the complaint was filed two years after enactment of Maryland's redistricting plan. But concern for avoiding delay in the disposition of cases like this one counsels strongly in favor of *granting* the petition, not the other way around.

1. Respondents say (Opp. 15-16) that injunctive relief will be unavailable regardless of this Court's intervention because petitioners were "dilatory," filing their complaint two years after Maryland enacted its congressional redistricting plan.

That is no basis for denying review. To begin with, the propriety of injunctive relief is an issue that must be decided by a three-judge district court in the first instance. See *Holland* v. *Florida*, 560 U.S. 631, 653-654 (2010) ("recogniz[ing] the prudence, when faced with an 'equitable, often fact-intensive' inquiry, of allowing the lower courts 'to undertake it in the first instance'") (quoting *Gonzalez* v. *Crosby*, 545 U.S. 524, 540 (2005) (Stevens, J., dissenting)).

Setting that aside, petitioners here were hardly dilatory. At the time the complaint was filed, four congressional elections remained to be held under the challenged reapportionment scheme, in 2014, 2016, 2018, and 2020. Even now, three of those elections have yet to take place. Courts have not hesitated to grant permanent injunctions under similar circumstances. In *Johnson* v. *Miller*, 864 F. Supp.

1354 (S.D. Ga. 1994), for example, the court entered a permanent injunction requiring Georgia to "reconfigure" its 1991 reapportionment map (*id.* at 1393), even though the complaint in that case was filed on January 13, 1994, after an election already had been "held under the new congressional redistricting plan on November 4, 1992." *Id.* at 1369. Those are the precise same circumstances as here. And this Court noted probable jurisdiction in that case and affirmed. *Miller* v. *Johnson*, 515 U.S. 900 (1995).

In *Simkins* v. *Gressette*, 631 F.2d 287 (4th Cir. 1980), *Maryland Citizens* v. *Governor of Maryland*, 429 F.2d 606 (4th Cir. 1970), and *MacGovern* v. *Connolly*, 637 F Supp. 111 (D. Mass. 1986), by contrast, each of the complaints was filed a decade or longer after the relevant census, with no further elections to take place under the challenged reapportionment schemes. That does not describe this case in the least.[3]

2. Respondents also say (Opp. 14-16) that further review will disserve the purpose of Section 2284's streamlined procedures. In fact, it is the lower courts' application of *Duckworth* that has undermined (and, without this Court's intervention, will continue to undermine) the policies underlying Section 2284. See Pet. 22-24; Br. of Judicial Watch 8-9 (explaining how "[t]he inefficiencies of the Fourth Circuit's rule are not limited to cases in which referral is denied").

---

[3] Moreover, there was good reason for the modest delay before the filing of the complaint in this case: A referendum to veto the reapportionment was held on November 6, 2012, and litigation was ongoing in *Fletcher* until June 25, 2012. Had either of those efforts succeeded in invalidating the redistricting map, this lawsuit would not have been necessary.

Here, the complaint was filed on November 5, 2013. If it had been referred to a three-judge district court, as we argue it should have been, a final judgment on the merits would have been entered long ago, and any appeal to this Court already would have been briefed, and perhaps also decided.

But because the complaint was dismissed by a single-judge district court under *Duckworth*, the court of appeals was interposed in the appellate process. That added a seven-month delay—fairly short by modern standards. And because the sole issue that the Fourth Circuit had jurisdiction to decide was whether the case was properly dismissed without convening a three-judge court, a reversal would have required a remand to the district court for a decision on the merits in the first instance. As it is, the Fourth Circuit affirmed, resulting in a certiorari petition, which is likewise limited to the three-judge-court question, and not the merits.

The result, assuming this Court now intervenes, will be greater than a two-year delay before this case is finally referred to a three-judge court, as it should have been from the start. And make no mistake, the fault for that delay—which is certain to be repeated in every other case that poses before this Court the question presented in the petition—lies squarely with the Fourth Circuit and *Duckworth*, not with petitioners. To avoid such delay in future cases, and for all the other reasons given above and in the petition, immediate review is in order.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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MAY 2015

No. 14-990

In The
Supreme Court of the United States

STEPHEN M. SHAPIRO,
O. JOHN BENISEK, AND MARIA B. PYCHA,

Petitioners,

v.

DAVID J. MCMANUS, JR., CHAIRMAN,
MARYLAND STATE BOARD OF ELECTIONS;
AND LINDA H. LAMONE,
STATE ADMINISTRATOR OF ELECTIONS,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fourth Circuit**

BRIEF OF *AMICI CURIAE* COMMON CAUSE AND THE CAMPAIGN LEGAL CENTER, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are nonpartisan organizations committed to democracy and electoral reform.[1] The *amici* are as follows:

Amicus curiae Common Cause is a nonpartisan, grassroots, citizens organization dedicated to fair elections and making government at all levels more democratic, open, and responsive to the interests of all people. Founded by John Gardner in 1970 as a "citizens lobby," Common Cause has over 400,000 members nationwide and local chapters in 35 states. Common Cause has been a leader in the fight for open, honest, and fair elections. Common Cause has also been a leading proponent of redistricting reforms and a vigorous opponent of partisan gerrymanders and voter suppression by both political parties. Common Cause organized and led the coalitions that secured passage of the ballot initiatives that created independent redistricting commissions in Arizona and California and that secured the passage of an amendment to the Florida Constitution prohibiting partisan gerrymandering.

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[1] This *amici* brief is filed in support of petitioners with the consent of the parties. Petitioners have granted blanket consent, and a letter confirming Respondents' consent is being filed herewith in accordance with this Court's Rule 37.3(a). Pursuant to Rule 37.6, the *amici* submitting this brief and their counsel hereby represent that neither the parties to this case nor their counsel authored this brief in whole or in part and that no person other than the *amici* paid for or made a monetary contribution toward its preparation and submission.

Amicus curiae The Campaign Legal Center, Inc. (CLC) is a nonpartisan, nonprofit organization that works in the area of election law, generally, and voting rights law, specifically, generating public policy proposals and participating in state and federal court litigation throughout the nation regarding voting rights. The CLC has served as *amicus curiae* or counsel in voting rights and redistricting cases in this Court, including *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015); *Shelby County v. Holder*, 133 S. Ct. 2612 (2013); *Bartlett v. Strickland*, 556 U.S. 1 (2009); and *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), among others. The CLC has a demonstrated interest in voting rights and redistricting law.

SUMMARY OF THE ARGUMENT

Petitioners Steven Shapiro, John Benisek, and Maria Pycha filed a constitutional challenge to Maryland's 2011 congressional apportionment statute, alleging a violation of their rights guaranteed by the First Amendment. The allegations of the complaint presented a valid federal claim that the 2011 apportionment by the Maryland legislature violated the First Amendment by discriminating against Republican voters in the sixth congressional district, in which Benisek resides, because of their political party affiliations and their voting histories in favor of Republican candidates for Congress.

In 2011, Democrats controlled large majorities in both houses of the Maryland legislature and the governorship. In the wake of the 2010 census, the legislature enacted sections 8-701 through 8-711 of Maryland's Election Code, gerrymandering the sixth congressional district to make it impossible for the Republican incumbent to be reelected. The apportionment statute "packed" the district with 33,000 new Democratic voters and "cracked" the Republican majority in the district by removing 66,000 registered Republican voters and disbursing them into surrounding uncompetitive districts. Prior to the 2011 gerrymander, registered Republicans outnumbered registered Democrats in the sixth district by a 12-point margin; as a result of the 2011 apportionment, registered Democrats outnumbered registered Republicans in the new sixth district by an 11-point margin. The results were predictable: a Democratic challenger defeated the Republican incumbent in the 2012 general election and was reelected to the House in 2014. The Republican share of representation in the House was cut in half, from two members to one member of the eight-member Maryland delegation.

John Benisek voted in Maryland's sixth congressional district as a registered Republican. Petitioners alleged that Maryland had reapportioned the sixth district, among others, in a manner that targeted and penalized Benisek and other Republican voters in that district because of their political views in a manner that diminished the value of Benisek's vote in congressional elections and ensured that he and other

Republican voters could no longer elect their preferred candidate in the House of Representatives. Petitioners requested a three-judge court to adjudicate the claims – including the First Amendment claim – alleged in their *pro se* complaint.

The single-judge district court determined three judges were not required and dismissed petitioners' First Amendment claim for want of subject-matter jurisdiction after concluding that the claim was legally insufficient under Rule 12(b)(6). The district court relied on *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769, 772–73 (4th Cir. 2003), for the rule "that where a plaintiff's pleadings do not state a claim, then by definition they are insubstantial and so properly are subject to dismissal by the district court." (Pet. App. 7a–8a (internal quotation marks omitted).) In the district court's estimation, the "substantial question standard" for purposes of determining the existence of federal-question jurisdiction and "the legal sufficiency standard" for the dismissal of a complaint under Rule 12(b)(6) "are one and the same." (*Id.* 7a (internal quotation marks omitted).) The Fourth Circuit summarily affirmed "for the reasons stated by the district court." (*Id.* 2a.)

This Court must reverse for two reasons. First, the *Duckworth* rule is an aberration unique to the Fourth Circuit. It is flawed, both legally and logically, and conflicts with the controlling decisions of this Court. Jurisdiction over a claim is a threshold issue that must be decided before a court determines the

merits. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–102 (1998). The Fourth Circuit's rule conflates a standard to determine federal-question jurisdiction with the standard to determine whether a complaint, over which a federal court has jurisdiction, is dismissible on the pleadings for failure to state a claim. The petitioners' complaint stated, at the least, an arguable claim of viewpoint-based discrimination under the First Amendment, invoking the jurisdiction of the single-judge court. Once jurisdiction attached, 28 U.S.C. § 2284(b) prohibited the single-judge court from deciding the merits of petitioners' claim and required three judges to "hear and determine" it.

Second, even if Rule 12(b)(6) were applicable, the facts alleged in the complaint stated a valid claim of viewpoint-based discrimination under the First Amendment and should not have been dismissed on the pleadings. This Court has recently found that "[p]artisan gerrymanders . . . [are incompatible] with democratic principles," many of which sound in the guarantees of the First Amendment. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2657 (2015) (second alteration original). The First Amendment requires that government maintain a posture of strict neutrality in matters of religious and political affiliations and beliefs by prohibiting the organs of government, including state legislatures, from targeting the adherents of a particular religious or political view for disfavored treatment. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality). If the Maryland legislature had

apportioned the sixth district to remove Catholic voters in order to create a Protestant majority and ensure the election of a Protestant to Congress, this Court would not hesitate to hold that the First Amendment had been violated. The First Amendment likewise prohibits a state legislature from allocating electoral power based on the political affiliations and voting histories of voters in a particular district. As Justice Kennedy explained in *Vieth v. Jubelirer*:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering . . [that contravene] the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. . . . Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. . . . First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a . . . voter['s] representational rights.

541 U.S. 267, 314–15 (2004) (Kennedy, J., concurring) (internal citations omitted); *accord League of Latin Am. Citizens v. Perry ("LULAC")*, 548 U.S. 399,

461–62 (2006) (Stevens, J., concurring in part and dissenting in part) (finding not only that the First Amendment protects "citizens from official retaliation based on their political affiliation," but also that the state redistricting at issue "was entirely inconsistent with [this] principle[ ].").

Each of the lower courts' errors is encompassed within the grant of *certiorari* and is squarely before the Court.[2] Accordingly, this Court should reverse and

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[2] This Court granted *certiorari* to decide whether "a single-judge district court [may] determine that three judges are not required to hear an action that is otherwise covered by 28 U.S.C. § 2284(a) on the ground that the complaint fails to state a claim under Rule 12(b)(6)." (Pet. at i.) The single-judge court's decision that petitioners' First Amendment claim was insubstantial and thus dismissible for want of jurisdiction was predicated on its determination that the claim was legally insufficient under Rule 12(b)(6). Because petitioners' amended complaint stated a claim under the First Amendment for which relief can be granted, however, that claim was *necessarily not* insubstantial. Thus, the question whether the district court correctly concluded that three judges were not required *because* petitioners failed to state a claim under the First Amendment "fairly include[s]" the question whether petitioners stated a claim under the First Amendment. Accordingly, pursuant to Supreme Court Rule 14.1(a) and this Court's decisions under that rule, the latter question that the lower courts determined to ground their holding is properly before this Court. *Compare Yee v. City of Escondido*, 503 U.S. 519, 536–37 (1992) (holding that whether an ordinance effects a regulatory taking is not "fairly included" in the wholly separate question of whether it effects a physical taking), *with Procunier v. Navarette*, 434 U.S. 555, 559–60 n.6 (1978) (holding that the predicate question whether the Constitution protected a prisoner's mailing privileges was "fairly comprised" in the question of whether the petitioner stated a

(Continued on following page)

remand with instructions to convene a three-judge court.

ARGUMENT

I. THE FOURTH CIRCUIT CONFLATED THE LEGAL STANDARD FOR DETERMINING THE EXISTENCE OF SUBJECT-MATTER JURISDICTION OVER A CLAIM WITH THE STANDARD FOR DETERMINING WHETHER THE CLAIM IS DISMISSIBLE UNDER RULE 12(B)(6).

The Fourth Circuit's rule that "the substantial question" standard for determining the existence of federal-question jurisdiction under 28 U.S.C. §§ 1331 and 2284 is "one and the same" as "the legal sufficiency standard" for dismissing a case under Rule 12(b)(6) is legally and logically flawed. It is legally flawed because less is demanded to establish federal-question jurisdiction than to state a valid claim on the merits. *Compare Bell v. Hood*, 327 U.S. 678, 682–85 (1946) (Black, J.), *with id.* at 685 (Stone, C.J., dissenting); *see also Baker v. Carr*, 369 U.S. 186,

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cause of action under 42 U.S.C. § 1983); *see generally* STEPHEN M. SHAPIRO, ET AL., SUPREME COURT PRACTICE § 6.25(g) (10th ed. 2013). Moreover, because the lower courts directly "passed upon" the issue of whether petitioners' complaint stated a claim under the First Amendment that issue is reviewable by this Court. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330 (2010); *United States v. Williams*, 504 U.S. 36, 41 (1992).

199–201 (1962); *Swafford v. Templeton*, 185 U.S. 487, 493 (1902). The Fourth Circuit's rule is also logically flawed because it assumes that all complaints that fail to state a valid claim on the merits are *ipso facto* "insubstantial" and can also be dismissed for want of jurisdiction. While it is true that all "insubstantial" complaints necessarily fail to state a claim on which relief can be granted, it does not follow (nor is it true) that all complaints that fail to state a claim are "insubstantial" and thus dismissible for want of jurisdiction.

A. Jurisdiction Is A Threshold Question That Does Not Depend On The Validity Of Petitioners' First Amendment Claims.

A federal court lacks the power to "rule on the merits of a case without first determining that it has . . . subject-matter jurisdiction." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31 (2007) (internal quotations omitted). Jurisdiction is "a matter for threshold determination [that, in part,] turn[s] on whether the question [is] too insubstantial for consideration." *Hagans v. Lavine*, 415 U.S. 528, 538–39 (1974).

To invoke the subject-matter jurisdiction of the federal courts under 28 U.S.C. § 1331, a complaint must allege a not insubstantial claim that a plaintiff's rights under the Constitution or laws of the United States have been violated. "'A claim is insubstantial only if . . . [there is] no room for the inference

that the questions sought to be raised can be the subject of controversy.'" *Hagans*, 415 U.S. at 538 (quoting *Goosby v. Osser*, 409 U.S. 512, 518 (1973)).

"It is firmly established . . . that the absence of a valid (*as opposed to arguable*) cause of action does not implicate subject-matter jurisdiction." *Steel Co.*, 523 U.S. at 89 (emphasis added); *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103 (1933); *Swafford*, 185 U.S. at 493. Thus, to invoke the subject-matter jurisdiction of a federal court, it was not necessary that petitioners' complaint allege a legally valid claim under the Constitution or laws of the United States that would survive a motion to dismiss under Rule 12(b)(6). Rather, it was only necessary that petitioners' complaint alleged an "arguable" claim that "can be the subject of controversy" under the First Amendment. *See Steel Co.*, 523 U.S. at 89; *Hagans*, 415 U.S. at 538.

As this Court's decision in *Swafford v. Templeton* illustrates, a federal court's jurisdiction over a complaint does not depend on whether it states a claim upon which relief can be granted. 185 U.S. at 493. There, the plaintiff alleged that his constitutional right to vote for a member of Congress had been violated. *Id.* at 492. The circuit court in *Swafford* made exactly the same mistake as the lower courts did in this case: It dismissed the complaint for want of jurisdiction because it thought that the complaint failed to state a cause of action. *Id.* This Court reversed, holding:

> It is obvious . . . that the court, in dismissing for want of jurisdiction, was controlled by what it deemed to be the want of merit in the averments which were made in the complaint as to the violation of the Federal right. *But as the very nature of the controversy was Federal, and, therefore, jurisdiction existed, whilst the opinion of the court as to the want of merit in the cause of action might have furnished ground for dismissing for that reason, it afforded no sufficient ground for deciding that the action was not one arising under the Constitution and laws of the United States.*

Id. at 493 (emphasis added).

Similarly, in *Bell v. Hood*, the petitioners filed a complaint seeking damages against agents of the Federal Bureau of Investigation for alleged violations of the Fourth and Fifth Amendments. 327 U.S. at 679–80. The respondents moved to dismiss for failure to state a claim. *Id.* at 680. The district court *sua sponte* dismissed for lack of jurisdiction, and the court of appeals affirmed on that ground. *Id.* Before this Court, the respondents argued that the suit was properly dismissed for want of jurisdiction because the petitioners did not state a claim, as neither the constitutional amendments at issue, nor federal statute, had provided for a remedy for monetary damages. *Id.* at 680–81.[3] This Court held, however,

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[3] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), was not decided until 1971.

that this contention was "not decisive on the question of jurisdiction of the federal court," *id.* at 681, because "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover," *id.* at 682.

These precedents show that a federal court has federal-question jurisdiction when a complaint presents an arguable federal controversy, not only when it states a valid federal claim. Once the district court acquires subject-matter jurisdiction of a federal claim, that jurisdiction does not evaporate or cease to exist *nunc pro tunc* if the court later determines that the claim is meritless and subject to dismissal under Rule 12(b)(6).

B. If A Constitutional Challenge To A Congressional Apportionment Is Substantial, A Single Judge May Not Dismiss It For Want Of Jurisdiction, And Three Judges Are Required To "Hear And Determine" Its Merits.

28 U.S.C. § 2284 requires that *all* cases in which the constitutionality of a congressional apportionment is challenged cannot be decided by a single district judge who would otherwise have jurisdiction but must "be heard and determined" by a three-judge court. 28 U.S.C. § 2284(b); *see also id.* § 2284(b)(3) (stating that "[a] *single judge shall not . . . enter judgment on the merits.*") (emphasis added). If the complaint alleges an "arguable" claim that the

congressional apportionment is unconstitutional, then the district judge to whom the case is initially assigned cannot dismiss the complaint for failure to state a claim. In that event, three judges are required to "hear and determine" the claims on the merits. Conversely, if a claim is insubstantial, a single-judge district court may dismiss it for want of jurisdiction and, on that basis, determine that three judges are not required. *Goosby*, 409 U.S. at 518; *see also Gray v. Sanders*, 372 U.S. 368, 370 (1963); *Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam).

As this Court explained in *Goosby*, "constitutional substantiality" for purposes of 28 U.S.C. § 2284 "has been equated with such concepts as essentially fictitious, wholly insubstantial, obviously frivolous and obviously without merit." 409 U.S. at 518 (internal quotations omitted). These limiting words have "cogent legal significance," meaning that a constitutional challenge to a congressional apportionment is insubstantial "only if the prior decisions [of this Court] inescapably render the claims frivolous . . . and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Id.* (internal quotations omitted).

It follows that a complaint which alleges, as does the complaint in this case, an "arguable" claim that the apportionment of congressional districts in Maryland violated the First Amendment invokes the subject-matter jurisdiction of the federal courts. No decision of this Court has ever inescapably held that the First Amendment affords no protection against

discriminatory state apportionment statutes; to the contrary, at least three Justices of this Court have found that partisan gerrymanders can implicate the guarantees of the First Amendment. *See LULAC*, 548 U.S. at 461–62 (Stevens, J., concurring in part and dissenting in part); *Vieth*, 541 U.S. at 314–15 (Kennedy, J., concurring). Petitioners' allegations were therefore sufficient to give the district judge to whom the case was assigned jurisdiction; thereafter, 28 U.S.C. § 2284(b) limited the judge's power to "hear and determine" the merits of petitioners' First Amendment claim only as a member of a three-judge court.

C. Once Jurisdiction Attached, 28 U.S.C. §§ 2284 (b) And (c) Precluded The Single-Judge District Court From Deciding Whether Petitioners' Complaint Stated A Valid Claim Under The First Amendment.

Only a three-judge district court has jurisdiction to "hear and determine" the merits of a constitutional challenge to a congressional apportionment statute, 28 U.S.C. § 2284(b), and a "single judge shall not . . . enter judgment on the merits" of such a challenge, *id.* § 2284(b)(3); *see also Goosby*, 409 U.S. at 518; *Ex parte Poresky*, 290 U.S. at 31 (finding that if the court has jurisdiction "a single judge was not authorized to dismiss the complaint on the merits, whatever his opinion of the merits might be").

The district court exceeded the limits on its authority imposed by 28 U.S.C. §§ 2284(b) and (c) when it decided that the petitioners' complaint failed to state a claim under the First Amendment and dismissed for lack of jurisdiction. The district court was not permitted to bypass the limits § 2284 set on its power by couching as "jurisdictional" a determination of the merits of a constitutional challenge to a congressional apportionment. *See Goosby*, 409 U.S. at 522 n.8 (reversing the appellate court's jurisdictional ruling on substantiality because it "implie[d] an adjudication of the merits of petitioners' constitutional contentions.").

II. PETITIONERS STATED A VALID CLAIM THAT MARYLAND'S 2011 CONGRESSIONAL APPORTIONMENT STATUTE VIOLATED THE FIRST AMENDMENT.

Petitioners' challenge to Maryland's 2011 apportionment statute not only presents an "arguable" federal controversy, but also states a valid claim under the First Amendment for which relief can be granted. The lower courts' finding of insubstantiality was error for this stronger reason.

The lower courts' determination that petitioners' challenge to the apportionment of Maryland's congressional districts failed to state a claim was based on an unacceptably narrow view of the scope of the protection afforded by the First Amendment. The district court ruled that petitioners' First Amendment

rights were not violated because "nothing about the congressional districts at issue in this case affects in any way [their] ability to participate in any of the Maryland congressional districts in which they might find themselves" because "[t]hey are free to join preexisting political committees, form new ones, or use whatever other means are at their disposal to influence the opinions of their congressional representatives." (Pet. App. 20a–21a.)

The First Amendment guarantees to petitioners much more than the lower court recognized. It is not necessary, as the district court ruled, that an apportionment statute *deny entirely* a person's right to join a political party or cast a ballot before the First Amendment is violated. The First Amendment protects against all forms of government discrimination based on political viewpoint as reflected by a person's party affiliation or voting history. Accordingly, these guarantees are trampled after a majority party in a state legislature uses its power to reapportion congressional districts in a way that penalizes certain individuals whose political views it disfavors and draws them into districts, in which they can still vote, but in which their votes could not affect the outcome of the election.

The First Amendment protects the right "to participate in electing our political leaders," *McCutcheon v. Fed. Elec. Comm'n*, 134 S. Ct. 1434, 1440–41 (2014), by guaranteeing "the freedom of speech," "the right of the people peaceably to assemble," and the right to "petition the Government for a redress of grievances,"

U.S. Const. amend. I. The right to vote in federal elections is protected by these guarantees. *See Anderson v. Celebrezze*, 460 U.S. 780, 786 n.7 (1983) (holding that "impact of candidate eligibility requirements *on voters*" implicated rights protected by the First Amendment) (emphasis added). The First Amendment also guarantees the right not be discriminated against because of one's political viewpoint and the right not to be penalized because of an affiliation with a political party. *See, e.g.*, *Elrod*, 427 U.S. at 356–57. Partisan gerrymanders offend each of these core guarantees by diminishing the power of a person's vote *because* of his or her political affiliation.

A. Partisan Gerrymanders Supplant The Right Of Persons To Choose Their Representatives In Congress And Trivialize The Significance Of The First Amendment.

The right "to participate in electing our political leaders" is basic to our democracy. *McCutcheon*, 134 S. Ct. at 1441. The right to vote for members of Congress is at the heart of the First Amendment and Article I, Section 2. "Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Partisan gerrymanders abridge that right and "'[are incompatible] with democratic principles.'" *Ariz. State Legislature*, 135 S. Ct. at 2658 (alteration original) (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 292 (2004) (plurality)). Through gerrymandering, a State attempts to so

control the people's constitutionally-conferred right to choose their representatives as to displace that choice with the State's own preference. Gerrymanders are not only profoundly anti-democratic; they are unconstitutional.

The Constitution creates and guarantees a democracy in which members of Congress are chosen by "the People," not by the state legislatures. U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII. Because election procedures are required to enable "the People" to choose their representatives, the Constitution, through the Elections Clause, grants States the power to design those procedures. U.S. Const. art. I, § 2, cl. 1; *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804–05 (1995).

The Elections power is not absolute, however. It is limited in scope, and is only "a grant of authority to issue procedural regulations, and *not . . . a source of power to dictate electoral outcomes.*" *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (emphasis added). It is also subject to limits imposed by other provisions of the Constitution, including the First Amendment. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (citing *Eu v. San Francisco Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989)); *see also Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The limits on the Elections power were recognized from the beginning. At the Federal Convention, Madison asserted "that the Legislatures of the States ought not to have the uncontrolled right of regulating the times places & manner of holding elections."

2 RECORDS OF THE FEDERAL CONVENTION 240 (Max Farrand ed., rev. 1966). The Framers anticipated that the State legislatures "would take care so to mould their regulations as to favor the candidates they wished to succeed," and that "[i]t was impossible to foresee all the abuses that might be made of the discretionary power." *Id.* at 240–41; *see also generally Vieth*, 541 U.S. at 274–75 (plurality) (discussing gerrymandering before and at the time of the Framing).

Article I, Section 2 and the Seventeenth Amendment limit the Elections power. The Constitution confers the power to choose members of Congress on the people, not the state legislatures. U.S. Const. Art. I, § 2, cl. 1; U.S. Const. amend. XVII; *see also Ex parte Yarbrough*, 110 U.S. 651, 663–64 (1884). This principle abides in the bedrock of our constitutional structure. *U.S. Term Limits*, 514 U.S. at 783 (It is a "fundamental principle of our representative democracy, . . . that the people should choose whom they please to govern them.") (internal quotation omitted). It is the beginning of republican liberty. *Ariz. State Legislature*, 135 S. Ct. at 2674–75 ("The genius of republican liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it should be kept in dependence on the people." (quoting THE FEDERALIST NO. 37 (James Madison))). And it is evinced by one of the first choices at the constitutional convention that the people, not the state legislatures, would choose the Members of the House of Representatives, unlike the

Senate, which would be chosen by the state legislatures. *See generally* 1 RECORDS OF THE FEDERAL CONVENTION, at 48, 132 (Max Farrand ed., rev. 1966). As a matter of first principle, state legislatures lack the power to skew, much less supplant, the people's choice of their representatives in the national government. *See Cook*, 531 U.S. at 523 (finding that the Elections Clause is not "a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints" (internal quotations omitted)); *U.S. Term Limits*, 514 U.S. at 841 (Kennedy, J., concurring) (finding "beyond dispute, that . . . the National Government is, and must be, controlled by the people *without collateral influence by the States*") (emphasis added).

The First Amendment also limits the power of a state legislature to enact elections regulations that seek to influence the people's choice of their congressional representatives. *See Cook*, 531 U.S. at 530–31 (Rehnquist, J., concurring in judgment) (finding that First Amendment barred states from seeking to influence election outcomes by placing information about candidates' positions on ballot). A central purpose of the First Amendment is to enable and inform the choice of political representatives. *See Williams v. Rhodes*, 393 U.S. 23, 32 (1968) ("Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms."); *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (finding that

"freedom to think as you will and speak as you think are means indispensable to the discovery and spread of political truth"); *see generally* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 17–25, 76–96 (2015); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) ("The principle of the freedom of speech . . . is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."). Just last term, this Court declared that the First Amendment "helps produce informed opinions among members of the public, who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015). State regulations that displace or bias the people's choice of their representatives in Congress preclude the public's "electoral mandate" and, therefore, abridge the First Amendment right to participate in electing our political leaders and trivialize its protections of political speech.

Partisan gerrymanders are nothing less than state attempts to bias, if not dictate, the people's choice of their representatives in Congress. As such, they exceed both the grant of power conferred on states by the Elections Clause, *see Cook*, 531 U.S. at 523, and the limits imposed by the First Amendment, *id.* at 530–31 (Rehnquist, J., concurring in judgment). States may not determine the choice of the people's representatives in the House of Representatives

without exceeding those limits. The choice of national representatives was reserved to the people at the constitutional convention. State legislatures may not undermine that foundational decision through an *ultra vires* exercise of the power granted by the Elections Clause.

For these reasons, this Court has enforced the limits of state exercise of the elections power to reapportion congressional districts. In *Wesberry v. Sanders*, this Court held that partisan gerrymanders that resulted in congressional districts with unequal populations violate Article I, Section 2, which entails "one person, one vote" and makes "equal representation for equal numbers of people the fundamental goal." 376 U.S. 1, 18 (1964). "The doctrine of 'one person, one vote' originally was regarded as a means to prevent discriminatory gerrymandering since 'opportunities for gerrymandering are greatest when there is freedom to construct unequally populated districts.'" *Davis v. Bandemer*, 478 U.S. 109, 168 n.5 (1986) (Powell, J., concurring) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 n.4 (1969)).

Wesberry ameliorated – but did not eradicate – impermissible state control over the people's choice of their national representatives. "Advances in computer technology achieved since the doctrine [of one person, one vote] was announced have drastically reduced its deterrent value by permitting political cartographers to draw districts of equal population that intentionally discriminate against cognizable groups of voters." *Davis*, 478 U.S. at 168 n.5 (Powell,

J., concurring). Thirty years have only confirmed Justice Powell's observation. State legislatures can craft congressional districts to preordain electoral outcomes. *See, e.g.*, *LULAC*, 548 U.S. at 411–13. The methods that States now use to gerrymander congressional districts, though observing the equal apportionment requirements of Article I, Section 2, directly implicate other constitutional guarantees. The methods by which gerrymanders are now achieved most poignantly offend the core protections of the First Amendment.

B. The First Amendment Furnishes A Right Against Partisan Gerrymanders That Discriminate According To Viewpoint.

The First Amendment limits regulations that subject voters to disfavored treatment *because* the State favors or disfavors a particular political viewpoint, candidate, or party. It's easy to see why. No court would entertain the thought that a State could use its Elections power to intentionally favor certain religious views over others. *See Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (finding that "the First Amendment enjoins the employment of organs of government for essentially religious purposes."). A state legislature could not apportion legislative districts to ensure the election of a Catholic because the state favors Catholicism's views on abortion or climate change. Analogously, a state may not bias the election of a member of a

political party because it favors (or disfavors) the views of party members about, for example, abortion or climate change. The First Amendment protects the freedom of conscience to author one's own view of the right and the good, be it religious or secular, and to support that view in the democratic contest. A state may no more influence the outcome of elections to favor a religious view than to favor a political view. Each constitutes impermissible viewpoint-based discrimination. *See Vieth*, 541 U.S. at 314 (Kennedy, J., concurring); *cf. Williams*, 393 U.S. at 30 (holding Ohio ballot restrictions unconstitutional because they unequally burdened the First Amendment rights of voters who supported minor parties); *Am. Party of Tex. v. White*, 415 U.S. 767, 795 (1974) (holding Texas law limiting absentee ballots to only the two major parties discriminatorily burdened the First Amendment rights of a minor party that had secured a candidate on the general ballot).

Viewpoint-based discrimination is anathema to the First Amendment, and the prohibition of such discrimination unites much First Amendment jurisprudence. States may not prescribe what is orthodox in politics. *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Nor may states distort the "free trade in ideas," *see Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), by selecting among viewpoints in the public fora and requiring those it favors or burdening those it disfavors, *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) ("It is axiomatic that the

government may not regulate speech based on . . . the message it conveys."); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."); *id.* at 430–31 (Stevens, J., concurring) (internal citations omitted) (finding that viewpoint discrimination "requires particular scrutiny, in part because such regulation often indicates a legislative effort to skew public debate on an issue"). The First Amendment's prohibition on viewpoint-based discrimination supplies the rationale for subjecting content-based speech regulations to strict scrutiny, *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2222 (2015) (Kagan, J., concurring in judgment), and applies even when the activity being burdened is not independently protected by the Amendment's guarantees, *see, e.g.*, *R.A.V.* 505 U.S. at 391–92 (holding First Amendment proscribes special limitation on fighting words, which are unprotected speech, that express a particular viewpoint). This paramount First Amendment concern arises across a variety of state actions; unites this Court's decisions about election regulations, time, place, and matter restrictions, and political patronage; and, accordingly, is implicated by partisan gerrymanders.

First, the prohibition on political gerrymanders that discriminate according to viewpoint is reflected by the standard this Court has applied to review other First Amendment challenges to election regulations. In *Burdick v. Takushi*, this Court recognized

that all election laws invariably impose some burden on individual voters and has subjected such laws to different levels of scrutiny depending on the nature and relative severity of the burden alleged. 504 U.S. at 434. If the election regulation imposes only "reasonable, *nondiscriminatory* restrictions 'upon the First and Fourteenth Amendment rights of voters,'" the restriction is subject to a sliding scale under which a severe burden is subject to strict scrutiny, and the level of scrutiny declines in proportion to the severity of the burden. A "State's important regulatory interests are generally sufficient to justify" a "reasonable, *nondiscriminatory* restriction." *Id.* (emphasis added) (citing *Anderson*, 460 U.S. at 788). Conversely, if the regulation is discriminatory or politically non-neutral, then it "must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal quotation omitted); *see id.* at 438 (holding that strict scrutiny was not the appropriate standard to evaluate Hawaii's ban on write-in ballots because the restriction was "politically neutral" and not "content based").[4]

Second, to the extent that reapportionment statutes regulate the "time, place, and manner" of

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[4] *Burdick*'s bifurcated standard of scrutiny is also a recurring theme in First Amendment jurisprudence as applied to exercises of the Elections power: laws that incidentally burden activity protected by the First Amendment are subject to less scrutiny than laws that purposefully do so. *Compare Burdick*, 504 U.S. at 434, *with Emp't Div. v. Smith*, 494 U.S. 872, 878 (1990), *and United States v. O'Brien*, 391 U.S. 367, 377 (1968).

activity protected by the First Amendment, the prohibition on viewpoint-based discrimination also informs this Court's review. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 536 (1980) (internal quotation omitted) (finding that when a time, place, and manner regulation "is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited merely because public officials disapprove the speaker's views"); *cf. O'Brien*, 391 U.S. at 377 (holding regulation that incidentally burdens protected activity is justified if, *inter alia*, "the governmental interest is unrelated to the suppression of free expression"). This Court has scrutinized "place" regulations – including regulations of the location of prurient theaters – to determine if the state intended to disfavor the messages expressed therein. *See, e.g., Renton v. Playtime Theatres*, 475 U.S. 41, 47 (1986) (finding that zoning ordinance circumscribing the permissible locations for peep-show theaters (thereby "packing" them) was a permissible time, place, and manner regulation because there was no indication that the government found the views expressed unacceptable); *Young v. Am. Mini Theatres*, 427 U.S. 50, 71 n.34 (1976) (finding that an ordinance declustering (or "cracking") peep-show theaters was a permissible time, place, and manner regulation because the zoning ordinance did not attempt to avoid "the dissemination of 'offensive' speech"). If the guarantees of the First Amendment are implicated by state regulations that crack and pack prurient theaters, *a fortiori*, they are

implicated by state legislation that cracks and packs voters to dominate their electoral participation and to control the outcome of congressional elections.

Third, partisan gerrymanders invoke the First Amendment's guarantees because that amendment proscribes state actions that retaliate against or penalize persons because of their political affiliations. In *Elrod v. Burns*, this Court held that the First Amendment forbids government entities from dismissing non-policy employees because of their political views or partisan support. 427 U.S. at 356. The *Elrod* Court found that "[c]onditioning public employment on partisan support prevents support of competing political interests. . . . Patronage thus tips the electoral process in favor of the incumbent party." *Id.* *Elrod* reaffirmed that states may not impose burdens based on political viewpoint because that would impermissibly distort competition in the electoral process and the marketplace of political ideas. *See id.* at 357. Accordingly, *Elrod* subjected the patronage-based employment dismissals to strict judicial scrutiny. *Id.* at 363.

These different lines of First Amendment analysis show that congressional reapportionment statutes must not target certain views for disfavored treatment. Like any election regulation, congressional apportionment statutes must be non-discriminatory. *Burdick*, 504 U.S. at 434. Further, like some zoning regulations, reapportionment statutes regulate the location of activity protected by the First Amendment and, accordingly, must be scrutinized to ensure that

the state's interest is unrelated to disfavoring a specific viewpoint. *Compare Renton*, 475 U.S. at 47, *with Davis*, 478 U.S. at 166 (Powell, J., concurring) (finding that because "the contours of a voting district powerfully may affect citizens' ability to exercise influence through their vote, district lines should be determined in accordance with neutral and legitimate criteria . . . [and] the State should treat its voters as standing in the same position, regardless of their political beliefs or party affiliation.").

Partisan gerrymanders cannot avoid such scrutiny; they constitute viewpoint-based discrimination *par excellence*. Like the patronage-based dismissals considered in *Elrod*, partisan gerrymanders assign cognizable burdens on persons *because* of their political views. The brunt of the burden is the same basic, cognizable injury that this Court has recognized in the past: diminution of voting power. While gerrymanders allow persons to cast ballots, they discriminatorily diminish the value of that vote and thereby harm protected activity. *Cf. Gray*, 372 U.S. at 380 (holding that, even though urban voters could vote in primary elections for statewide office, the county-unit method for counting those votes unconstitutionally diminished the "true weight" of their votes); *Smith v. Allwright*, 321 U.S. 649, 658–60 (1944) (holding that, even though black Texans could cast ballots in general elections, Democratic party qualifications that prevented their primary votes for Democratic candidates in primary elections abridged the right to vote). The bare vote dilution, however, is not the whole of

the injury. Political gerrymanders dilute the power of individuals to participate in the electoral process *because* of their political viewpoint as reflected by their party affiliation and voting history. Such discrimination offends the First Amendment.

Partisan gerrymanders also offend the First Amendment by impermissibly distorting the electoral process and the marketplace of ideas. These are also cognizable harms against which the First Amendment guards. *See Williams*, 393 U.S. at 32. If the First Amendment limits state employment decisions based on partisan support because of their distorting effects on the political process, *a fortiori*, it limits state legislatures from configuring districts for the election for congressional representatives based on persons' party affiliations to influence the outcome of the elections in those districts. The distortions on the electoral process caused by districts drawn according to the viewpoints of persons residing therein are far more direct and profound than those that troubled the *Elrod* Court.

The distortions caused by partisan gerrymanders are legion and "obvious." *See Vieth*, 541 U.S. at 361 (Breyer, J., dissenting). Partisan gerrymanders contribute to the decline in competition for congressional seats when they protect incumbents. Thomas E. Mann, *Polarizing the House of Representatives*, in RED AND BLUE NATION? 280 (Pietro S. Nivola and David W. Brady, eds., 2006). They also render primary elections decisive. THOMAS E. MANN AND NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS 46 (2012).

Thus, they tie the democratic debate close to the party line, subsidizing particular viewpoints in the trade of ideas. *See* THOMAS E. MANN AND NORMAN J. ORNSTEIN, THE BROKEN BRANCH 230 (2008). Partisan gerrymanders also distort the accountability and responsiveness of congressional representatives to their constituency as a whole, as members of Congress are incentivized to over-privilege those views and constituents that are most helpful in the primary elections. *See* Samuel Issacharoff and Jonathan Nagler, *Protected From Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 Ohio St. L. J. 1121, 1131 (2007). Further, because congressional redistricting requires Representatives to rely on their fellow partisans in the state legislatures, partisan gerrymandering reinforces political rigidity by raising the costs for a Representative otherwise willing to depart from party orthodoxy. MANN AND ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS at 145. And, because partisan gerrymanders preordain the outcome of elections, they dampen voter turnout.

C. A State Apportionment Of Congressional Districts That Is Based On An Individual's Political Views Or Affiliations And That Discriminatorily Diminishes The Weight Of His Or Her Vote Is Unconstitutional Unless It Is Necessary To Serve A Compelling State Interest.

To guard against these harms, the First Amendment limits the apportionment of congressional

districts based on the political affiliation or the voting history of persons residing therein. Considering *Elrod*, the *Vieth* plurality recognized that, if sustained, the First Amendment "would render unlawful *all* consideration of political affiliation in districting." 541 U.S. at 294. The *Vieth* plurality understood that conclusion as proving too much, but this concern is overstated. Under the First Amendment, a State must apportion congressional districts by looking to facially neutral factors, including "compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests," *Miller v. Johnson*, 515 U.S. 900, 916 (1995), unless it can carry the burden of demonstrating that a compelling interest makes it necessary for it to consider persons' political views or voting history, *see Vieth*, 541 U.S. at 314 (Kennedy, J., concurring). Hence, the First Amendment subjects viewpoint-based discrimination in the drawing of legislative districts to the *same* scrutiny that it subjects other state actions that discriminate according to viewpoint.

To be sure, this Court has said that politics is a permissible consideration in legislative apportionment, not subject to the scrutiny of the federal courts. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234, 257–58 (2001) (upholding a duopolistic gerrymander); *Gaffney v. Cummings*, 412 U.S. 735, 751–54 (1973). Such dicta, however, were tethered to equal protection challenges to partisan gerrymanders. As compared to the Equal Protection Clause of the Fourteenth Amendment, the

First Amendment affords a different set of protections, for a different set of reasons.

Constitutional scrutiny is "claim specific." *Vieth*, 541 U.S. at 294. "An action that triggers a heightened level of scrutiny for one claim may receive a very different level of scrutiny for a different claim *because the underlying rights, and consequently constitutional harms, are not comparable.*" *Id.* (emphasis added). The harm of viewpoint-based discrimination, cognizable under the First Amendment, does not present the same measurement problems as the harm alleged, and which confounded the plurality, in *Vieth*. 541 U.S. at 281–306. The First Amendment's concern with viewpoint-based discrimination is triggered by a switch, not a scale. Even a little viewpoint-based discrimination is sufficient to call for its protection. Accordingly, the First Amendment furnishes a right against viewpoint-based discrimination, and this Court's decisions articulating that right permit no conclusion other than that partisan gerrymanders contravene it.

The question is not close. In *Young* and *Renton*, this Court found that municipal ordinances regulating the location of prurient theaters implicated the protections of the First Amendment and scrutinized whether those ordinances were enacted to target the messages conveyed therein. More recently, in *Reed*, this Court subjected a small town's ordinance restricting "temporary directional signs" directing the public to a church or other event to strict judicial scrutiny because the restriction was content-based

and thus presented the "danger of censorship." 135 S. Ct. at 2229. A First Amendment jurisprudence that, to guard against viewpoint-based discrimination, would scrutinize place regulations of "peep shows" or prophylactically subject a town's "directional signage" ordinance to strict scrutiny, but which would not subject a state apportionment of congressional districts that dilutes the votes of certain individuals *because* of their political views or voting history to *any* scrutiny, has simply lost the forest for the trees.

D. Petitioners' Amended Complaint Sufficiently Alleged That Maryland's Gerrymander Diluted Petitioner Benisek's Vote And, Therefore, States A Claim Under The First Amendment Upon Which Relief Can Be Granted.

To state a First Amendment challenge to a state-created electoral district, a plaintiff must plead two elements: first, that the State created the district *based on* the political views, partisan support, or voting history of those persons residing within it, and, second, that the reapportionment caused plaintiff a cognizable, non-generalized injury.

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Petitioners' *pro se* amended complaint

contains allegations that, if true, are sufficient to establish that at least four of the congressional districts created by Maryland's 2011 apportionment, codified at Maryland Code, Election Law §§ 8-701–11, were based on the political views and the voting history of the persons residing therein. (*See, e.g.*, Opp. App. 31, Pet'rs' Am. Compl., at ¶ 5 (claiming "that the structure and composition of the abridged sections constitute infringement of First Amendment rights of political association, as each of the abridged sections voted strongly Republican in the 2008 Presidential election").)

Petitioners' amended complaint also contains allegations that, if true, show that 2011 congressional reapportionment inflicts a cognizable harm – namely, the dilution of their votes for their preferred representatives in Congress. This is especially the case for petitioner Benisek, who resides in Maryland's sixth congressional district. Prior to the 2011 reapportionment, Republicans comprised 46.7% of electors; after, they comprised 33.3%. *Compare* MD. STATE BD. OF ELECTIONS, ELIGIBLE ACTIVE VOTERS ON PRECINCT REGISTER, 2010 GUBERNATORIAL GENERAL ELECTION (2010), http://www.elections.state.md.us/press_room/2010_stats/gg10_statewide.pdf, *with* MD. STATE BD. OF ELECTIONS, ELIGIBLE ACTIVE VOTERS ON PRECINCT REGISTER, 2012 PRESIDENTIAL GENERAL ELECTION (2012), http://www.elections.state.md.us/press_room/documents/PG12/PrecinctRegisterCounts/Statewide.pdf. As a result of the 2011 reapportionment, Republicans who had lived in the sixth district in 2010 could no

longer elect the representative of their choice, either in that district or in one of the adjacent districts that were dominated by Democrats. Accordingly, the 2011 reapportionment unquestionably diminished the value of petitioner Benisek's vote.

As such, petitioners, and especially petitioner Benisek, do not allege a generalized grievance.[5] Nor do they complain of an injury to Republicans statewide, as was alleged in *Vieth*. *See* 541 U.S. at 272. Rather, petitioners claim that Maryland's congressional apportionment diluted their own votes. In the case of petitioner Benisek, the Maryland legislature rendered his vote for his preferred representative effectively null by drastically changing the shape and composition of the sixth district, which had elected a Republican representative, to achieve a likely outcome that the legislature reasonably expected that Benisek and other Republican voters would disfavor.

Because the petitioners' complaint has stated a claim, it is not insubstantial, and the lower court erred.

* * *

Partisan gerrymanders are incompatible with democratic principles. *Ariz. State Legislature*, 135

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[5] Moreover, petitioner Benisek's injury is sufficient to establish this Court's review. *See Massachusetts v. EPA*, 549 U.S. 497, 518 (2007) (internal citation omitted).

S. Ct. at 2658. They are also incompatible with the First Amendment's prohibition on viewpoint-based discrimination, and the federal courts have jurisdiction to so hold.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the circuit court and remand with instructions to convene a three-judge district court to adjudicate petitioners' First Amendment claim.

Respectfully submitted,

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No. 14-990

In the

Supreme Court of the United States

STEPHEN M. SHAPIRO, ET AL.,

PETITIONERS,

v.

DAVID J. MCMANUS, JR., CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS, ET AL.,

RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS JOSHUA A. DOUGLAS AND MICHAEL E. SOLIMINE, ELECTION LAW SCHOLARS, IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Professor Joshua A. Douglas and Professor Michael E. Solimine are election law experts who have a particular interest in the procedural aspects of election litigation.

Professor Douglas is the Robert G. Lawson & William H. Fortune Associate Professor of Law at the University of Kentucky College of Law. He teaches courses in Election Law, Civil Procedure, Constitutional Law, and Supreme Court Decision Making. He is the co-author of an election law case book and has written numerous articles on the topic, including several regarding the procedural aspects of election law cases.

Professor Solimine is the Donald P. Klekamp Professor of Law at the University of Cincinnati College of Law. He teaches Election Law, Civil Procedure, Complex Litigation, and Federal Courts. He is also a co-author of an election law case book and has written scores of articles, including several specifically about the three-judge district court process.

Professors Douglas and Solimine are filing this brief because they have a keen interest in ensuring that the federal courts employ the proper procedure

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[1] Petitioners and respondents have filed blanket consent letters with the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amici* and their counsel contributed monetarily to the preparation or submission of this brief.

in election law cases, as doing so helps to resolve these disputes in a manner that best comports with the unique aspects of the electoral system. This brief explains why district courts should not use the pleading standard from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), in making the threshold determination whether to refer a redistricting case to a three-judge district court. Relying on Professor Douglas's and Professor Solimine's experience and expertise in this area, it describes the history of the three-judge district court and explains the strong legal and policy reasons why Congress intended for three-judge district courts to resolve redistricting cases. The single district judge here improperly dismissed this case without referring it to a three-judge district court.

INTRODUCTION AND SUMMARY OF ARGUMENT

This is a case about election law procedure. Although seemingly arcane, the question presented is vitally important to the proper handling and resolution of election disputes in federal court. If this Court does not correct the district court's decision, it would set a dangerous precedent that would have significant negative consequences for the proper functioning of the electoral system.

There are two primary reasons to reject the single district judge's refusal to refer this case to a three-judge court.

First, the district court failed to follow this Court's precedent when it construed the sufficiency of the plaintiffs' complaint under the *Twombly* and *Iqbal* pleading standard instead of determining whether the plaintiffs' claims were "obviously frivolous." The single district judge believed that the plaintiffs' legal contention of partisan gerrymandering failed the plausibility standard of *Twombly* and *Iqbal*; but those cases apply to a complaint's factual allegations, not to its legal contentions. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). This Court said so explicitly (and unanimously) in *Johnson v. City of Shelby*, holding that a district court may not dismiss a complaint for an "imperfect statement of the legal theory supporting the claim asserted." 135 S. Ct. 346, 346 (2014) (per curiam). Instead of invoking *Twombly* and *Iqbal*, the single district judge was required to determine whether the plaintiffs' claims were "obviously frivolous." *Goosby*

v. Osser, 409 U.S. 512, 518 (1973). Because asserting unlawful partisan gerrymandering under the First Amendment is not obviously frivolous under this Court's decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the district judge should have referred the matter to a three-judge court.

Second, the single district judge's failure to comply with precedent is inconsistent with the policies that Congress sought to implement when enacting the Three-Judge Court Act. Although Congress restricted the jurisdiction of three-judge district courts in certain areas, it explicitly retained it for redistricting cases given the importance of the disputes, the particular concern for timeliness, and the desire to create a tribunal that can render decisions seen as legitimate and devoid of ideological taint. Refusing to refer these cases to three-judge courts, and instead allowing a single judge to decide the merits, will thwart these important policy goals.

The district court went beyond its authority in dismissing this case on the merits. This Court should reverse the Fourth Circuit's affirmance of the district court's decision as contrary to both precedent and the historical and policy goals of the Three-Judge Court Act. Doing so will help to streamline the resolution of redistricting disputes.

ARGUMENT

I. The Single District Court Judge Erred In Failing To Refer This Redistricting Dispute To A Three-Judge District Court.

The single district court judge in this case improperly applied the *Twombly/Iqbal* pleading

standard and erroneously found that the plaintiffs' complaint failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). Instead, the district judge should have determined whether plaintiffs' claims were "obviously frivolous." If the district court had applied the correct standard, it would have denied the motion to dismiss and referred the case to a three-judge district court.

A. A District Court Judge May Refuse To Refer a Qualifying Case To A Three-Judge Court Only If The Claim Is "Obviously Frivolous."

The Three-Judge Court Act provides that "[a] district court of three judges shall be convened when an action is filed challenging the constitutionality of the apportionment of congressional districts " 28 U.S.C. § 2284(a). This Court has recognized only limited exceptions to that mandate. In *Goosby v. Osser*, this Court unanimously held that a single district judge to which the case is initially assigned may refuse to convene a three-judge district court only when the claim is "wholly insubstantial," which the Court equated with being "obviously frivolous." 409 U.S. 512, 518 (1973).

The term "obviously frivolous" has special meaning in the context of the Three-Judge Court Act. This Court has explained generally that a legal claim is "frivolous" where "[none] of the legal points [are] arguable on their merits." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989) (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)). A complaint is "frivolous" only "where it lacks an arguable basis either in law

or in fact." *Ibid.* In the context of the Three-Judge Court Act, an even higher bar applies for dismissing a case before referring it to a three-judge panel. As this Court has explained, the complaint must not only be frivolous, but "wholly insubstantial" and "obviously frivolous." *Goosby*, 409 U.S. at 518. "The limiting words 'wholly' and 'obviously' have cogent legal significance." *Ibid.* The words "import that claims are constitutionally insubstantial only if the prior decisions *inescapably* render the claims frivolous; previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes' of the Three-Judge Court Act. *Ibid.* (emphasis added).

The "obviously frivolous" standard sets a low bar because, as this Court explained long ago, the determination as to whether to convene a three-judge district court serves the principal purpose of ensuring that the panel has subject-matter jurisdiction. *See Ex parte Poresky*, 290 U.S. 30, 32 (1933) (per curiam) (explaining that "the District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears"); *see also Stratton v. St. Louis Sw. Ry. Co.*, 282 U.S. 10, 13, 18 (1930) (holding that a single judge may dismiss a case that warrants a three-judge district court only for lack of jurisdiction). Accordingly, a single judge is not "authorized" to dismiss a case on the merits, no matter what "his opinion of the merits might be." *Ex parte Poresky*, 290 U.S. at 31; *see also Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715 (1962) (per curiam) (a single judge may not "decide the merits").

B. The District Court Judge Improperly Invoked The *Twombly/Iqbal* Pleading Standard.

The district court failed to apply the "obviously frivolous" standard because it wrongly imported the pleading rules from *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), to determine whether to refer this case to a three-judge district court. *Twombly* and *Iqbal*, however, do not apply to the question of whether a claim is "obviously frivolous," "wholly insubstantial," or lacking federal court jurisdiction, which are the only bases to deny convening a three-judge district court. *See Goosby*, 409 U.S. at 518. Moreover, *Twombly* and *Iqbal* require courts to consider the factual plausibility of a plaintiff's complaint, not the legal sufficiency of the plaintiff's arguments. But the district court here did not hold that the plaintiffs' *facts* were insufficient. It stated, instead, that it believed the plaintiffs' *legal arguments* were unmeritorious. *Twombly* and *Iqbal* provide a poor framework for testing the legal sufficiency of a redistricting claim.

In *Twombly*, this Court held that, in deciding a motion to dismiss under Rule 12(b)(6), a court should consider whether the complaint includes facts that render the asserted claim "plausible." 550 U.S. at 557. "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555. Only "factually suggestive" complaints are sufficient. *Id.* at 557 n.5. Two years later, this Court in *Iqbal* reaffirmed that a complaint may not simply assert conclusory statements and instead must present

well-pleaded factual allegations that "plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

Importantly, in neither of these cases did the Court hold that a plaintiff's *legal* contentions must meet the plausibility standard. To the contrary, just last year this Court held unanimously that *Twombly* and *Iqbal* do not apply to a plaintiff's legal assertions. *Johnson v. City of Shelby*, 135 S. Ct. 346 (2014) (per curiam). In *Johnson*, this Court, in summarily reversing a lower court's dismissal under Rule 12(b)(6), explained that *Twombly* and *Iqbal* "concern the *factual* allegations a complaint must contain to survive a motion to dismiss." *Id.* at 347 (emphasis added). "Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief'; they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* at 346 (citing FED. R. CIV. P 8(a)).

Johnson's logic applies with particular force in the election law context. Election law cases, including redistricting disputes, are typically poor vehicles for applying the *Twombly/Iqbal* standard. The facts are often not in dispute and the ultimate question is the legal implications of the undisputed facts. *See* Joshua A. Douglas, *Election Law Pleading*, 81 GEO. WASH. L. REV. 1966, 1986 (2013) ("*Twombly* and *Iqbal* therefore do not help much in the redistricting context: there is little need for a 'factual plausibility' showing when a plaintiff already knows all of the facts to state a claim but must establish that those facts will lead to legal liability.").

The district court here dismissed the plaintiffs' First Amendment claim not because of a failure to present sufficient factual content but because of a perceived deficiency in the legal argument regarding whether the First Amendment can support their claim for unlawful partisan gerrymandering. No one disputes that the plaintiffs have presented sufficient facts regarding Maryland's redistricting. The question is the legal implication of those facts. The single district court judge thus erred in refusing to convene a three-judge district court based on a disagreement with the plaintiffs' legal theory.

C. The Plaintiffs' Claims Are Not Obviously Frivolous.

To dismiss this case without convening a three-judge district court, the single district judge would have had to conclude that the plaintiffs' suit is so insubstantial and frivolous that there can be no doubt that precedent would completely foreclose their claims. *See Goosby*, 409 U.S. at 518. The district judge here did not—and under this Court's precedent could not—reach that conclusion.

The plaintiffs base their claim for partisan gerrymandering on the First Amendment. They assert that Maryland's redistricting plan burdens their First Amendment rights of political association by gerrymandering congressional districts along political lines. Regardless of the ultimate merits of the claim, this Court has explicitly left the door open to this argument. Refusing even to allow a three-judge district court to consider the claim is contrary to this Court's invitation—per Justice Kennedy's concurrence in *Vieth v. Jubelirer*, 541 U.S. 267, 306–

18 (2004)—for litigants to suggest judicially manageable standards in this area.

In *Vieth*, four Justices found claims of partisan gerrymandering nonjusticiable, four Justices offered a variety of standards, and Justice Kennedy, whose opinion was the narrowest ground for decision, stated that he would "not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." *Id.* at 306 (Kennedy, J., concurring in the judgment). As Justice Kennedy noted, "[t]hat no such standard has emerged in this case should not be taken to prove that none will emerge in the future." *Id.* at 311. He also pointed explicitly to the First Amendment as a likely source of a judicially manageable standard: "The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering." *Id.* at 314.

The district court was therefore incorrect in construing *Vieth* as "holding" that claims of partisan gerrymandering are nonjusticiable and thereby rendering the plaintiffs' claim frivolous or wholly insubstantial. *See* Pet. App. 17a–20a. There were only four votes in *Vieth* for holding all future partisan gerrymandering claims nonjusticiable. Because of Justice Kennedy's narrower conclusion, plaintiffs are free to offer judicially manageable standards that might convince the Court that there is a path to judicial oversight of partisan gerrymandering. Justice Kennedy's separate opinion in essence invites

future litigants to consider the First Amendment as a possible source of a judicially manageable standard.

That is exactly what the plaintiffs did here. Refusing them the opportunity to present the argument to a three-judge district court would thwart the potential of a judicially manageable standard ever emerging. Under the district court's ruling, no single judge would ever send a claim for partisan gerrymandering to a three-judge district court because of the mere possibility that these claims are always nonjusticiable under *Vieth*. This would present a tangible harm to redistricting litigation and to any future effort to locate a judicially manageable standard. Moreover, as this Court stated in *Goosby*, "previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes' of whether to convene a three-judge district court. *Goosby*, 409 U.S. at 518. Even if the plaintiffs' legal argument is doubtful under *Vieth*, the district court should still have convened a three-judge tribunal to consider the merits.

Under the Three-Judge Court Act, it is not up to a single judge to decide whether a plaintiff's legal claims have merit. The district court's overreach in deciding the merits of this dispute requires reversal and the convening of a three-judge court.

II. The District Court Judge's Failure To Refer This Case To A Three-Judge Court Is Contrary To Congressional Intent And Raises Significant Policy Concerns.

The permissive "obviously frivolous" standard under the Three-Judge Court Act is rooted in compelling policy considerations that favor having redistricting cases decided by three judges at the district court level. The district judge's decision in this case contravenes Congress's careful policy judgments.

A. The "Obviously Frivolous" Standard Is Tied To Congressional Intent And The History Of The Three-Judge Court Act.

Congress created the three-judge district court as a reaction to *Ex parte Young*, 209 U.S. 123 (1908), which held that state officials could be sued in federal court for enforcing allegedly unconstitutional state laws, notwithstanding that the state itself could not be named in the suit as a result of the Eleventh Amendment. The decision aroused great controversy, as it permitted constitutional attacks to be launched in federal court against Progressive Era legislation, as opposed to raising those issues as defenses to enforcement actions in state court. So controversial was the decision that proposed legislation sought to strip federal courts of their jurisdiction to hear such actions. But those proposed bills never became law and, in 1910, Congress settled on a "less drastic remedy." 17A Charles Alan Wright, et al., Federal Practice and Procedure § 4234 (3d ed. 2007).

The remedy consisted of requiring "the convening of extraordinary trial courts composed of three judges in certain kinds of cases," with a direct appeal available to this Court. *See generally* David P Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 2 (1964). The court consisted of the district judge before whom the case was originally assigned, plus a circuit judge and another judge (typically another district judge) who the Chief Judge of the circuit would select.

There were several, interrelated reasons Congress created this unique procedure for *Ex parte Young*-type actions. It was thought that such actions were important and complicated, and that they raised unique federalism concerns, so that the consideration of injunctive relief should not be in the purview of a single district judge. The presumably greater faculties and deliberation of three minds should be brought collectively to bear on the question. Congress also believed that there would be greater public acceptance of the decision if three federal judges rendered it rather than just one. And the provision for a direct appeal would allow for speedy resolution of the matter by this Court. 17A Federal Practice and Procedure § 4234; Currie, 32 U. CHI. L. REV. at 5–7; Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. 433, 458–63. Congress thought enough of the virtues of a three-judge district court that, in succeeding decades, it expanded the court's jurisdiction to encompass other weighty and controversial matters, including constitutional challenges to federal statutes (in 1937) and

declaratory judgments under the preclearance provisions of the Voting Rights Act (in 1965).

Although some critics of three-judge courts suggested that they unnecessarily burdened the federal judiciary, *see Ex parte Collins*, 277 U.S. 565, 567–69 (1928) (Brandeis, J.), Congress has seen the need to retain them for certain important cases such as redistricting disputes. In the early and mid-1900s, the concern with administrative burdens—on lower court judges in convening a three-judge panel for trial court litigation, and on this Court in disposing of mandatory direct appeals—became more pronounced as the number of such cases increased. *See* Michael E. Solimine, *The Three-Judge District Court in Voting Rights Litigation*, 30 U. MICH. J. L. REF. 79, 137–38 tbls. 1–2 (1996) (showing large numbers of three-judge court cases in district courts, and decided on direct appeal in this Court, in the 1960s and 1970s). As a result, many critics, in academia, among judges, and in the practicing bar, called for the abolition of the three-judge court, or at least the significant curtailment of its jurisdiction. For example, in a leading article, Professor David Currie argued that "consuming the energies of three judges to conduct one trial is prima facie an egregious waste of resources" and that the numerous direct appeals from these courts were an unnecessary exception to this Court's discretionary jurisdiction. Currie, 32 U. CHI. L. REV. at 2, 74.

Yet crucially, many authorities also argued that Congress should leave the three-judge district court intact for certain narrow categories of cases. Professor Currie suggested, for instance, that the

benefits of the court might still be appropriate for "[r]ace-relations and reapportionment cases, [which] have caused a good deal of friction between the states and the courts." *Id.* at 75. In its Study of the Division Between Federal and State Courts, the American Law Institute argued that the "image of the federal courts as a barrier against liberal state legislation [had] long since disappeared," but that "other controversies" had arisen that had led to "strained relations" between federal courts and the states. American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts*, 48–56, 319 (1969). The Study referred explicitly to cases arising under the Equal Protection Clause, including reapportionment disputes. *Id.* at 319–21.

These arguments informed Congress's reappraisal of the three-judge district court in the 1970s. The Judiciary Committees held extensive hearings on the topic in the first half of that decade, with many prominent judges, lawyers, and academics testifying both in support of and against limiting the jurisdiction of the three-judge court. *See* Michael E. Solimine, *Congress,* Ex parte Young, *and the Fate of the Three-Judge District Court*, 70 U. PITT. L. REV. 101, 141–44 (2008). To give one illustrative example, U.S. Court of Appeals judges Henry Friendly and J. Skelly Wright both testified in support of curtailing the court's jurisdiction in general but maintaining it for reapportionment cases in light of what they considered the "public importance" and the need for "public acceptance" of those decisions. *Id.* at 142.

This legislative consideration culminated in the 1976 Amendment, which abolished the court *except* for reapportionment cases and certain other cases that Congress explicitly designated. *See* Act of August 12, 1976, Pub. L. No. 94-381, 90 Stat. 1119 (codified in part at 28 U.S.C. § 2284(a)). The House and Senate Judiciary Committee reports acknowledged the administrative concerns critics had raised, but the reports determined that the "importance" of redistricting cases warranted retaining the three-judge district court for these disputes. S. Rep. No. 94-204, at 9 (1975), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1991; H.R. Rep. No. 94-1379, at 4 (1976). 17A Federal Practice and Procedure § 4235.[2] Congress's decision to keep the three-judge court for redistricting cases was thus a carefully considered choice. That choice would be undermined if a single district court judge could dispose of a redistricting case on the merits without the benefits of referring the case to a three-judge panel.

B. Strong Policy Reasons Counsel In Favor Of Having Three-Judge Courts Decide Redistricting Cases.

Redistricting cases are not ordinary civil disputes with typical pleading rules. They are a

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[2] The 1976 Amendment did not purport to curtail certain specialized three-judge district courts found in other legislation. This included the preclearance provisions of Section 5 of the Voting Rights Act of 1965 and certain other provisions of the Civil Rights Act of 1964.

special category of cases in which historical and contemporary practice demonstrates the wisdom of having three-judge district courts decide these cases.

The virtues of the three-judge district court process are particularly pronounced in redistricting cases. As compared to the typical three-tiered approach to federal court decision making, the three-judge court procedure, with direct appeal to this Court, usually produces faster decisions in an area in which quick resolution is needed so states may implement their new legislative maps for the next election. Moreover, both the litigants and the public may view a redistricting decision by a three-judge court as more accurate or legitimate because three judges—including one appellate judge—have come together to resolve the dispute. Similarly, having multiple judges decide a case that involves political issues can reduce the appearance or reality of ideology influencing the decision. *See* Douglas, 2011 UTAH L. REV. at 458–63 (highlighting timeliness, accuracy, mitigation of ideology, and legitimacy as virtues of the three-judge district court procedure for election law cases).

In addition, modern redistricting litigation often involves the use of sophisticated quantitative evidence and expert testimony. *See* D. James Greiner, *The Quantitative Empirics of Redistricting Litigation: Knowledge, Threats to Knowledge, and the Need for Less Districting*, 29 YALE L. & POL'Y REV. 527 (2011). There are thus benefits in having three minds, rather than just one, available to consider and analyze this evidence. Indeed, experience with the three-judge district court has shown that the

threshold issues that single judges sometimes consider "are not invariably easy ones" and are often better suited for the full three-judge panel. Currie, 32 U. CHI. L. REV. at 23.[3]

It is also not surprising that, given the controversial and contested nature of most redistricting cases, three-judge district courts have a much higher rate of dissent than the typical three-judge panel on the U.S. Courts of Appeals. *See* Solimine, 30 U. MICH. J. L. REF. at 139 tbl. 4 (noting that in 89 three-judge district court cases from 1976 to 1994, there was a dissent in 22 of them). Indeed, both of the three-judge district court cases that this Court reviewed last Term were 2-1 decisions. *See Ala. Legislative Black Caucus v. Alabama*, 989 F. Supp. 2d 1227 (M.D. Ala. 2013) (three-judge court), *vacated*, 135 S. Ct. 1257 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014) (three-judge court), *aff'd*, 135 S. Ct. 2652 (2015). Likewise, there is a much higher rate of appeal to this Court from three-judge district court decisions, as compared to the typical rate of appeal from decisions of a single district judge to the U.S. Court of Appeals. Solimine, 30 U. MICH. J. L. REF. at

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[3] David P. Currie, the distinguished analyst of the history and practice of the three-judge district court, wondered on this point, in a prescient way for the present case, whether a "single judge [should] have dismissed the suit to reapportion Tennessee's legislature on the basis of *Colegrove v Green*?" 32 U. CHI. L. REV. at 23 (footnote omitted). He was referring to *Baker v. Carr*, 369 U.S. 186 (1962), in which a three-judge district court was convened. 175 F. Supp. 649, 652 (M.D. Tenn. 1959).

99 (noting that up to 40 percent of three-judge district court decisions since 1976 have been appealed to this Court). These facts demonstrate the importance of a sustained three-judge court process.

Convening three-judge district courts in redistricting cases is also necessary to ensure that the law continues to develop. If plaintiffs could reach the three-judge court only by surviving a Rule 12(b)(6) motion to dismiss, plaintiffs would fear immediate dismissal when presenting a novel legal argument or a plea to overrule prior precedent. *Cf.* FED. R. CIV. P 11(b)(2) (noting that a lawyer may not be sanctioned for presenting a "nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). The purpose of the Three-Judge Court Act, however, was exactly the opposite—to ensure that the specific issues Congress identified as particularly important would receive full consideration by multiple judges. *See* S. Rep. No. 94-204, at 4, 9, *reprinted in* 1976 U.S.C.C.A.N. at 1991, 1996 (explaining that redistricting cases are "of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases"); *see also* Currie, 32 U. CHI. L. REV. at 24 (highlighting the Court's historical distinction in the three-judge court context between dismissals for lack of jurisdiction, which a single judge may issue, and dismissals on the merits, which are reserved for the three-judge tribunal).

These advantages would largely disappear if a single judge had broad authority to dismiss a case on non-jurisdictional, merits-based grounds without

allowing a three-judge district court to decide the dispute. A case would take longer as it wades through the normal appellate process in determining if the claim is actually frivolous, putting off a decision on the merits as the election clock continues to tick. The resulting lengthy process could also compromise accuracy and legitimacy in the very area in which Congress believed three judges were better than one. And the process would lose the benefits of different viewpoints mitigating the fear of ideology in a case involving politics.

Congress purposefully retained three-judge courts for redistricting cases to adhere to these policy goals. Allowing a single judge to dismiss a case on the merits without convening a three-judge court would undermine Congress's well-considered choice.

C. The District Court Judge's Approach Raises Broader Policy Concerns.

If the district court's holding had been in effect in other circuits, many important election law cases likely would have never reached this Court—or at least would have taken much longer to make their way through the U.S. Court of Appeals process, hampering states' ability to administer their upcoming elections. In addition to the two redistricting cases deriving from three-judge district courts that this Court considered in the previous Term, *see Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015), other significant redistricting cases might never have received the needed clarification that this Court provided. *See, e.g.*, *Perry v. Perez*, 132 S. Ct. 934

(2012) (per curiam); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006); *Cox v. Larios*, 542 U.S. 947 (Mem) (2004).[4] The Court also would likely not have had the same opportunity to resolve the important one person, one vote issue in *Evenwel v. Abbott*, 135 S. Ct. 2349 (Mem) (2015), this Term. If a single district judge can dismiss claims on the merits without referring them to a three-judge district court, then these cases, many of which asked the Court to overturn prior precedent, might have suffered premature dismissal without full vetting by a three-judge court, with direct appeal to this Court.

The consequences of the lower court's holding in this case are stark. Under the district court's view, a single district judge will be able to resolve the merits of a redistricting case without the benefit of convening a three-judge district court. A plaintiff can appeal that decision to the circuit court, and seek this Court's review via a writ of certiorari, but that path is fundamentally different from having the merits reviewed by a three-judge district court as an initial matter. Although a Rule 12(b)(6) motion to dismiss is entirely appropriate, and should be granted if warranted, in a redistricting case, *e.g.*, *Ariz. State Legislature*, 997 F. Supp. 2d at 1048, the appropriate

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[4] There are similar concerns for other election law cases that use the three-judge district court process, such as campaign finance or Voting Rights Act litigation. *See, e.g.*, *McCutcheon v. FEC*, 134 S. Ct. 1434 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193 (2009).

tribunal to consider such a motion is a three-judge district court.

CONCLUSION

This Court should reverse the Fourth Circuit's decision and remand the case for consideration by a three-judge district court.

Respectfully submitted,

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No. 14-990

IN THE

Supreme Court of the United States

STEPHEN M. SHAPIRO, O. JOHN BENISEK, AND MARIA B. PYCHA,

Petitioners,

v.

DAVID J. MCMANUS, JR., CHAIRMAN, MARYLAND STATE BOARD OF ELECTIONS; AND LINDA H. LAMONE, STATE ADMINISTRATOR OF ELECTIONS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR JUDICIAL WATCH, INC. AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

Judicial Watch, Inc. ("Judicial Watch") is a non-partisan educational foundation that seeks to promote transparency, integrity, and accountability in government and fidelity to the rule of law. Judicial Watch regularly files *amicus curiae* briefs as a means to advance its public interest mission and has appeared as *amicus curiae* in this Court on a number of occasions.

Judicial Watch believes that the decision below errs on an important issue of federal election law. In particular, Judicial Watch is concerned that the Fourth Circuit's ruling violates the Three-Judge Court Act and will allow states to delay judicial review of gerrymandered redistricting plans that disenfranchise voters and violate the Constitution. Moreover, on June 24, 2015, Judicial Watch filed a new constitutional challenge to Maryland's redistricting plan on behalf of several plaintiffs. *See Parrott v. McManus*, No. 1:15-cv-01849 (D. Md.). The plaintiffs have asked for a three-judge panel in *Parrott*, but no such panel has been convened yet, and a motion to dismiss is currently pending before the single judge initially assigned to the case.

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[1] All parties have consented in writing to the filing of this *amicus curiae* brief. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

The Three-Judge Court Act reflects Congress's longstanding judgment that certain lawsuits are too important to be decided by a single district judge. The Act mandates that district courts composed of three judges hear all constitutional challenges to legislative redistricting, as well as certain actions under the Voting Rights Act, the Bipartisan Campaign Reform Act, and other federal statutes[2]—unless the district judge to whom the case is initially assigned "determines that three judges are not required." 28 U.S.C. § 2284(b)(1). In that circumstance only, the single judge may dismiss the case instead of referring it to a three-judge court. However, this Court has long been clear—and, for decades, the circuits all agreed—that the bar for three-judge referral is quite low, and Congress has never suggested otherwise.

Under that standard, a claim must be heard by a three-judge court unless the claim is "obviously frivolous," "essentially fictitious," "wholly insubstantial," or "obviously without merit"—which occurs only when the claim's "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy." *Goosby v. Osser*, 409

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[2] These additional statutes include the Civil Rights Act of 1964, the Prison Litigation Reform Act, the Presidential Election Campaign Fund Act of 1971, the Child Internet Protection Act, and others. *See* 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 nn.3-5 (3d ed. 2014) (collecting examples).

U.S. 512, 518 (1973) (quoting *Bailey v. Patterson*, 369 U.S. 31, 33 (1962); *Ex parte Poresky*, 290 U.S. 30, 32 (1933); *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910)); *see also LaRouche v. Fowler*, 152 F.3d 974, 982 (D.C. Cir. 1998) ("The Supreme Court made clear just how minimal a showing is required to establish substantiality in *Goosby v. Osser*."). Put differently, one-judge dismissal is appropriate only "if the claim is so insubstantial that it does not invoke federal jurisdiction," which "will be rare indeed." 17A Wright, Miller, Cooper & Amar, Federal Practice and Procedure § 4235 (3d ed. 2014). As Petitioners explain, their First Amendment claim plainly satisfies this undemanding standard. Pet. Br. at 35-39.

In 2003, however, the Fourth Circuit parted ways with this long line of authority. Under *Duckworth v. State Administration Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), a case is not referable to a three-judge court whenever the complaint fails to state a claim under Rule 12(b)(6). *Id.* at 772-73. The Fourth Circuit has thus replaced the longstanding test of frivolousness with a much less demanding standard that permits many more claims to be withheld from referral to three-judge courts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (Rule 12(b)(6) requires "a claim to relief that is plausible on its face").

Notably, the Fourth Circuit did not acknowledge or explain this change. Instead, the *Duckworth* court simply supported its holding with a citation to an older case, *Simkins v. Gressette*, 631 F.2d 287, 295 (4th Cir. 1980). But *Simkins* used not a Rule 12(b)(6) test but instead the well-settled frivolousness

standard—and, moreover, cited *Goosby* for support. It is thus hard to understand the basis for *Duckworth*'s departure from *Goosby*.

As Petitioners demonstrate, the Fourth Circuit's current test for three-judge referral is wrong for many reasons. Moreover, the Fourth Circuit's novel approach creates significant problems. For one, it enlists a single district judge to decide the legal sufficiency of a redistricting challenge (as part of any Rule 12(b)(6) motion). Such an allocation of authority cannot be squared with Congress's judgment—recognized by this Court and others—that apportionment challenges and other types of three-judge cases are too significant to be initially decided by a single judge. Nor is the difference between one and three judges merely a formality. Redistricting cases raise difficult legal issues on which three-judge courts frequently divide, including at the motion-to-dismiss stage.

Moreover, if referral were governed by the "plausibility" standard that applies to motions under Rule 12(b)(6), the question of whether a case should be dismissed by one judge or heard by three will frequently be subject to dispute—with the possible need for appeals to the courts of appeals and even this Court. Such fights over how many judges should *hear* the case can only delay adjudication of the case's actual merits. Particularly in redistricting cases, such delays can matter a great deal. Indeed, courts will sometimes decline to order relief in redistricting cases—even if there is a constitutional violation—simply because the election schedule leaves too little time to adjust district lines. This scenario is less likely with the traditional frivolousness standard for

referral, which expedites three-judge consideration of the merits. The Fourth Circuit's rule, in contrast, can only slow these cases down.

In short, the Fourth Circuit's interpretation of the Three-Judge Court Act cannot be justified as a legal matter and is likely to have quite damaging consequences as a practical matter. This Court should not let the decision below stand.

I. THE FOURTH CIRCUIT'S RULE DEFEATS THE PURPOSE OF THREE-JUDGE COURTS BY HAVING ONE JUDGE DECIDE A CLAIM'S LEGAL SUFFICIENCY.

Three-judge district courts are "a unique feature of our jurisprudence." *Swift & Co. v. Wickham*, 382 U.S. 111, 116 (1965). They are available only "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body" or "when otherwise required by Act of Congress." 28 U.S.C. § 2284(a). Such cases call for proceedings markedly different from the typical federal lawsuit.

Specifically, when a three-judge court is requested, the judge to whom the suit was initially assigned "shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge." 28 U.S.C. § 2284(b)(1). Those three judges—the initially assigned district judge, a circuit judge, and a third judge—"shall serve as members of the court to hear and determine the action or proceeding." *Id.* Although a single member of the three-judge court "may conduct all proceedings except the trial" and

can enter most "orders permitted by the rules of civil procedure," only the full three-judge panel may "appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits." 28 U.S.C. § 2284(b)(3). In addition, "[a]ny action of a single judge may be reviewed by the full [three-judge] court at any time before final judgment." *Id.* Appeals from three-judge district courts are taken directly to this Court. *See* 28 U.S.C. § 1253.

When enacting this "exceptional procedure," Congress "sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge." *Phillips v. United States*, 312 U.S. 246, 250 (1941). But Congress was also careful to make three-judge courts available only for "a limited class of cases of special importance." *Id.* at 249 (quoting *Ex parte Collins*, 277 U.S. 565, 567 (1928)). That class of cases shrank in 1976, when Congress amended the Three-Judge Court Act. *See generally* Wright, Miller, Cooper & Amar, *supra*, § 4235 (discussing Act's evolution).[3] However, Congress "preserve[d] three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because . *these issues are of such importance* that they ought to be heard by a three-judge court." S. Rep. No. 94-204, at 9 (1976) (emphasis added), *reprinted in* 1976 U.S.C.C.A.N. 1988, 1996; *accord*

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[3] Three-judge courts are no longer available for all constitutional challenges to state laws, for example.

Page v. Bartels, 248 F.3d 175, 190 (3d Cir. 2001) (quoting *id.*) (noting "the unique importance of apportionment cases"). Thus, as this Court subsequently put it, lawsuits implicating the current Three-Judge Court Act "raise issues that are likely to be *of great importance* and in Congress' judgment justify a three-judge court, expedited review, and direct appeal to this Court." *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 487 (1985) (emphasis added) (addressing claims under Presidential Election Campaign Fund Act).

By eliminating three-judge referral whenever a single judge decides that the complaint does not survive a Rule 12(b)(6) motion, the Fourth Circuit pays little heed to the importance of the cases covered by the Three-Judge Court Act, and to Congress's preference to "not leav[e] the fate of such litigation to a single judge." *Phillips*, 312 U.S. at 250. A motion to dismiss under Rule 12(b)(6) calls for an assessment of both the allegations' plausibility as well as their "legal sufficiency"—such that a court must accept or reject a plaintiff's legal theory. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Accordingly, few events in a case are as important as a Rule 12(b)(6) motion to dismiss. Such motions are precisely what three-judge courts should be *deciding*, given that these courts exist to ensure "greater deliberation" with respect to the significant cases at issue. *Phillips*, 312 U.S. at 250. By instead using motions to dismiss to *limit access* to three-judge courts, the Fourth Circuit has turned the Three-Judge Court Act's purpose and framework on its head.

This is no small matter. The cases implicated by the Three-Judge Court Act are not just important but also often legally contentious. Indeed, three-judge courts regularly split 2-1 when deciding motions to dismiss in apportionment cases. *See, e.g.*, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Adams v. Clinton*, 90 F Supp. 2d 35 (D.D.C. 2000) (per curiam); *Johnson v. Mortham*, 915 F. Supp. 1529, 1559 (N.D. Fla. 1995); *Shaw v. Barr*, 808 F. Supp. 461 (E.D.N.C. 1992), *rev'd*, 509 U.S. 630 (1993).[4] Under the Fourth Circuit's rule, these cases might not even be *referred* to a three-judge court, depending on the views of the judge who initially drew the case. There is no basis for such a result, which flies in the face of the Three-Judge Court Act's very reason for existence.

II. THE FOURTH CIRCUIT'S RULE INVITES SIGNIFICANT PRACTICAL PROBLEMS.

Collapsing Rule 12(b)(6) and three-judge referral, as the Fourth Circuit has done, also invites major practical difficulties. These problems underscore how dramatically the Fourth Circuit's approach departs from what Congress intended.

As noted, Congress has provided that a three-judge court's decisions may be appealed directly to this Court, which is "a means of accelerating a final determination on the merits." *Swift*, 382 U.S. at 119. The circuits may still hear appeals in these cases, but only with respect to whether three-judge referral was

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[4] Though decided in the Fourth Circuit, *Shaw* predated *Duckworth*'s adoption of a Rule 12(b)(6) standard for three-judge referral.

wrongly denied. *See, e.g., Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 715-16 (1962) (per curiam). When that question turns on whether the case is "obviously frivolous," *Goosby*, 409 U.S. at 518, denials are less likely, and any appeals of these less-frequent denials should be faster to resolve.

Not so with the Fourth Circuit's rule. Under *Duckworth*, single-judge courts deny referral more frequently, as Petitioners have previously explained. *See* Pet. at 18-20. Though these denials can be appealed to the courts of appeals, such appeals—by turning on the more nuanced Rule 12(b)(6) standard—will likely take longer to decide. And the losing party could then seek this Court's discretionary review of any decision—all, again, just to determine whether a three-judge court should even *hear* the case.

The inefficiencies of the Fourth Circuit's rule are not limited to cases in which referral is denied. Even if a Fourth Circuit district judge grants referral by rejecting a motion to dismiss, the two judges then added to the panel might believe that the motion should have gone the other way. These judges could overrule their fellow panelist's initial judgment. *See* 28 U.S.C. § 2284(b)(3) ("Any action of a single judge may be reviewed by the full court at any time before final judgment."). And the mere possibility of such a reversal will accordingly invite relitigation of the motion to dismiss that had just been decided. Even if the first judge's ruling holds up (because one of the two new judges agrees with it), the Rule 12(b)(6) fight will have taken two rounds instead of one.

These delays matter, especially in redistricting cases. As a general matter, any inefficiencies in these cases run counter to Congress's attempts to "accelerat[e] a final determination on the merits" in such litigation. *Swift*, 382 U.S. at 119. But the pace of a redistricting case can also affect not just when but *how* the case is decided.

Three-judge courts must "act and rely upon general equitable principles" when weighing possible remedies in redistricting cases. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). And timing considerations—such as "the proximity of a forthcoming election"—can preclude relief "even though the existing apportionment scheme [is] found invalid." *Id.*; *see also, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e have authorized District Courts to order or to permit elections to be held pursuant to apportionment plans that do not in all respects measure up to the legal requirements, even constitutional requirements."); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967) (per curiam) (affirming the district court's decision allowing state legislative elections to proceed even though districting plan was "constitutionally infirm in certain respects").

This concern is far from theoretical. Courts regularly deny immediate relief in redistricting cases not because the underlying constitutional claim lacks merit, but because of timing. *See, e.g.*, *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 554 (E.D. Va. 2014) (three-judge court) (holding districting plan unconstitutional, but allowing elections to proceed under that plan because the general election was "roughly two months away"); *MacGovern v. Connolly*, 637 F. Supp. 111, 115 (D. Mass. 1986) (three-judge

court) (per curiam) (dismissing "substantively viable" redistricting challenge because of impending election, such that new district lines would "cause enormous disruption to Massachusetts voters, to candidates, and to the electoral process"); *Diaz v. Silver*, 932 F. Supp. 462, 468 (E.D.N.Y. 1996) (three-judge court) (per curiam) (assuming that challenge would prevail on merits and denying relief because "the harm to the public in delaying either the primary or the general election or even changing the rules as they now stand substantially outweighs the likely benefit to the plaintiffs of granting a preliminary injunction at this time"); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994) (three-judge court) (holding Texas district map unconstitutional but permitting its use in upcoming election), *aff'd sub nom.*, *Bush v. Vera*, 517 U.S. 952 (1996).

The traditional standard for three-judge referral reduces the odds that timing will force a court to tolerate a constitutional violation—for when the initial judge is simply making sure the challenge is not "obviously frivolous," *Goosby*, 409 U.S. at 518, it is less likely that a case will linger while the judge considers referral. But when that judge is instead applying the Fourth Circuit's more demanding standard for referral, *see Duckworth*, 332 F.3d at 772-73, the initial decision may well take longer, referral-related appeals (including to this Court) become more likely, and it could take significantly longer before a three-judge court even has the opportunity to reach the merits of the challenge. And when the clock is always counting down towards the next election, such a delay can control whether the alleged constitutional violation can be remedied or if it is something that a

state's voters simply must swallow. Under the Fourth Circuit's approach, the Three-Judge Court Act's ability to protect against such scenarios is substantially weakened. This Court should accordingly reject that rule and reaffirm the well-settled frivolousness standard for three-judge referral.

CONCLUSION

For the foregoing reasons, the decision below should be vacated.

Respectfully submitted.

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In The
Supreme Court of the United States

STEPHEN M. SHAPIRO, *et al.*,
Petitioners,

v.

DAVID J. MCMANUS, JR., Chairman,
Maryland State Board of Elections, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* VIRGINIA STATE CONFERENCE OF THE NAACP IN SUPPORT OF PETITIONERS

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BRIEF OF VIRGINIA NAACP AS *AMICUS CURIAE* SUPPORTING PETITIONERS

This brief is submitted on behalf of the Virginia State Conference of the National Association for the Advancement of Colored People ("Virginia NAACP") as *amicus curiae* in support of Petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The National Association for the Advancement of Colored People is one of the oldest and largest civil rights organizations in the United States. Its state conference in Virginia, the Virginia NAACP, is a non-partisan, non-profit membership organization with more than one hundred active branches and approximately 16,000 members throughout the Commonwealth of Virginia. One of the priorities of the Virginia NAACP is to advance and defend the voting rights of its members, including the right to be free from racial discrimination in voting and to elect candidates of their choice at every level of government. To that end, the Virginia NAACP has engaged in a variety of public education and community outreach activities to help assure that minority voters have an equal opportunity to participate in the political process.

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[1] The parties have consented to the filing of *amicus curiae* briefs in support of either party and have so informed the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

Additionally, the Virginia NAACP, its branches, and its members have regularly engaged in voting rights and redistricting litigation in Virginia courts and in the Fourth Circuit. These cases have included claims under the United States Constitution and Voting Rights Act of 1965, 52 U.S.C. §§ 10101-10702.[2] Most recently, in May 2015, the Virginia NAACP sought to intervene as a plaintiff in the remedy stage of a federal racial gerrymandering lawsuit challenging a 2012 redistricting plan for Virginia's congressional delegation.[3] In that lawsuit, which involves a claim under the Equal Protection Clause of the Fourteenth Amendment and implicated Section 5 of the Voting Rights Act, a single judge denied the Virginia NAACP's motion to intervene.[4]

The Virginia NAACP's experience as a voting rights litigant in the Fourth Circuit leads it to conclude that the District Court's decision and Fourth Circuit's affirmance, if not vacated, threaten to undermine the Three-Judge Court Act, 28 U.S.C.

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[2] *See, e.g., Virginia State Conf. of the NAACP v. Kaine*, No. 3:08-cv-00692 (E.D. Va. Nov. 3, 2008); *White v. Daniel*, 909 F.2d 99 (4th Cir. 1990); *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989); *Smith v. Bd. of Sup'rs of Brunswick Cnty.*, 801 F. Supp. 1513 (E.D. Va. 1992); *Neal v. Coleburn*, 689 F. Supp. 1426 (E.D. Va. 1988); *Cosner v. Robb*, 541 F. Supp. 613 (E.D. Va. 1982); *Cosner v. Dalton*, 522 F. Supp. 350 (E.D. Va. 1981).

[3] *See Page v. Virginia State Board of Elections*, 58 F. Supp. 3d 533 (E.D. Va. 2014) (three-judge court), *vacated and remanded sub nom. Cantor v. Personhuballah*, 135 S. Ct. 1699 (2015).

[4] *Page*, No. 3:13-cv-00678, ECF No. 169 (E.D. Va. May 26, 2015) (denying Motion to Intervene as Plaintiffs by Virginia NAACP).

§ 2284, as a key procedural safeguard for voting rights litigants. For this reason, *amicus* urges the Court to grant Petitioners' request to vacate the decision below and remand for consideration by a three-judge district court.

SUMMARY OF THE ARGUMENT

The District Court's decision and Fourth Circuit's affirmance reflect a fundamental misunderstanding of this Court's precedents interpreting the Three-Judge Court Act, and the recent experiences of the Virginia NAACP demonstrate why. The Fourth Circuit rule articulated in *Duckworth v. State Administrative Board of Election Laws*, 332 F.3d 769 (4th Cir. 2003), and applied in the instant case is simply wrong: in a case requiring the convening of a three-judge panel under Section 2284(a), allowing a single judge to rule on a Rule 12(b)(6) motion is error. If allowed to stand, the decisions below would undermine one of the very purposes of the Act as amended in 1976; recognizing the fundamental importance of cases involving the basic structures of representative democracy, the high risk of the appearance of political bias influencing outcomes, the need for quick resolution and the importance of fostering confidence in the impartiality of the judiciary in such matters, Congress sought to provide an essential safeguard for voting rights litigants in reapportionment cases. That safeguard of a three-judge trial court and direct appeal to this Court is especially important following the elimination of a major voting rights protection, the coverage formula for pre-clearance under Section 5 of the Voting

Rights Act, in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013). In order to ensure that voting rights litigants receive the even-handed and deliberative consideration to which they are entitled under the Three-Judge Court Act, and to continue the important progress that the Voting Rights Act was intended to foster, the Court should vacate the decisions below and remand for consideration by a three-judge district court.

ARGUMENT

I. Requiring Important Procedural Decisions to Be Made by Three-Judge Panels, As Opposed to Single Judges, Ensures that Voting Rights Litigants in Reapportionment Cases—Cases of "Special Importance"—Are Treated Even-Handedly and Thoughtfully.

The importance of having three-judge panels adjudicate redistricting claims is illustrated by the recent experience of the Virginia NAACP in confronting the roadblocks created when a single judge makes important procedural decisions in a three-judge redistricting case. In *Page v. Virginia State Board of Elections*, a racial gerrymandering challenge to Virginia Congressional District 3, a district which enables black voters to elect their candidate of choice, a three-judge panel was convened, and that panel ruled that the district was racially gerrymandered in violation of the Fourteenth Amendment to the U.S. Constitution. 58 F. Supp. 3d 533, 538-39 (E.D. Va. 2014). In a 2-1 decision on October 7, 2014, the three-judge court

found that race predominated in the 2012 drawing of Congressional District 3, and because Defendants in that action failed to prove that such race-based drawing satisfied strict scrutiny, the court ordered the legislature to redraw the district. *Id.* at 555. Judge Robert E. Payne dissented. *Id.* (Payne, J., dissenting).

In May 2015, the Virginia NAACP sought to intervene in the remedial proceedings in that action, in part because the current Plaintiffs lived only in Congressional District 3, and voters of color all across the state would be impacted by the remedy passed by the legislature and approved by the three-judge court. *Page*, 3:13-cv-00678, ECF No. 157 (May 5, 2015) (Motion to Intervene as Plaintiffs by Virginia NAACP). Judge Payne, the dissenting judge in the opinion striking down the district, denied the Virginia NAACP's motion to intervene on May 26, 2015, despite having granted the motion to intervene of Republican U.S. Representatives David Brat and Barbara Comstock only two weeks earlier. *Page*, 3:13-cv-00678, ECF No. 169 (May 26, 2015) (denying Motion to Intervene as Plaintiffs by Virginia NAACP); ECF No. 165 (May 11, 2015) (granting Motion to Intervene as Additional Intervenor-Defendants). Judge Payne ruled that the Virginia NAACP did not satisfy any of the requirements for intervention under either Fed. R. Civ. 24(a) or 24(b), including on timeliness grounds. ECF No. 169 at 1-2. There are no apparent distinctions between the two motions to intervene in terms of timeliness, interest in the litigation, or adequacy of representation that would justify or

explain such disparate treatment by the single judge ruling on the motions.

While the Virginia NAACP's experience in the *Page* case was not related to a Rule 12(b)(6) motion, it is illustrative of the challenges that face voting rights litigants when a single judge can make important procedural decisions without the input of a larger panel, and it demonstrates how procedural rulings ultimately can be dispositive of a litigant's claims—which is why the Three-Judge Court Act continues to be a critical safeguard in redistricting cases.

This Court has long recognized that the Three-Judge Court Act "was designed to secure the public interest in 'a limited class of cases of special importance.'" *Phillips v. United States*, 312 U.S. 246, 249 (1941) (quoting *Ex Parte Collins*, 277 U.S. 565, 567 (1928)). Congress expressly included reapportionment cases in that limited class when it amended the Three-Judge Court Act in 1976, explaining that "these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases." S. Rep. No. 94-204, at 9 (1976).

This Court has similarly recognized that voting rights, including those implicated in reapportionment cases, are of special importance, stating at the height of the Civil Rights Movement that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we

must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (striking down a state's congressional redistricting plan as discriminatory).

By their nature, reapportionment cases necessarily involve the sensitive, controversial, and inherently subjective issue of how to draw distinctions among groups of people along geographic and demographic lines. In these cases of special importance, three-judge panels serve as a safeguard for the interests of minority groups by vesting discretion in three judges rather than a single judge, and requiring two votes instead of just one to dismiss a plausible claim. *See Phillips*, 312 U.S. at 250 (By requiring three-judge courts in certain cases of special importance, "Congress thus sought to assure more weight and greater deliberation by not leaving the fate of such litigation to a single judge."). This need to err on the side of caution by convening a three-judge court exists not just in the trial stage of a reapportionment case, but also in the procedural and remedial steps involved in ultimate resolution of the issue. As John A. Buggs, staff director for the U.S. Commission on Civil Rights, wrote in a letter to Congress as it considered narrowing the Three-Judge Court Act in 1973:

> This more even-handed approach of three-judge courts is likely to appear not only in the substantive parts of cases, but also in procedural and evidentiary aspects as well. Although incorrect procedural rulings can be

> corrected on appeal, initial losses on important procedural motions can be extremely damaging to the posture of a civil rights case and to the political movement which generated it. There are also discretionary decisions—e.g., rulings on evidence critical to building a record and on the timing of what the court will hear and do—which in reality can't be corrected on appeal and which can determine the outcome of the case.

Three-Judge Court and Six-Person Civil Jury, Subcomm. on Courts, Civil Liberties, and Admin. of Justice of the Comm. on the Judiciary 146 (Oct. 10, 1973 & Jan. 24, 1974) (statement of John A. Buggs). Additionally, Buggs wrote, three-judge courts provide strength in numbers for judges in controversial civil rights cases in which the judges' decisions are likely to subject them to hostile public opinion. *Id.* Finally, because decisions from three-judge panels carry greater legal and moral authority than decisions of a single judge, they are more likely to be accepted and voluntarily complied with in controversial cases. *Id.* Indeed, while Congress did narrow the application of the Act in 1976, it explicitly retained the procedure for congressional and state legislative redistricting cases, in part for the reasons articulated above. *See, e.g.*, S. Rep. No. 94-204, at 9 (1976); 119 Cong. Rec. 666 (1973) (statement of Sen. Burdick).

By permitting a single judge to dismiss reapportionment challenges, the Fourth Circuit is

misapplying this Court's precedents and denying voting rights litigants in Virginia, West Virginia, Maryland, and the Carolinas the protections they are entitled to by statute against actual, implicit, or perceived bias, improper interpretation of applicable law, and delays in adjudicating their claims. These protections are enjoyed by similarly situated litigants in other circuits across the country, where three-judge courts have been convened in approximately two dozen voting rights cases since 2010.[5] This disparate treatment of voting rights litigants in the Fourth Circuit violates their statutory right to have their claims heard by a three-judge court and expeditiously appealed to this Court.

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[5] *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014); *Evenwel v. Perry*, No. 14-CV-335, 2014 WL 5780507 (W.D. Tex. Nov. 5, 2014); *Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042 (D. Ariz. 2014); *Kostick v. Nago*, 960 F. Supp. 2d 1074 (D. Haw. 2013); *Brown v. Ky. Leg. Research Comm'n*, 966 F. Supp. 2d 709 (E.D. Ky. 2013); *Perez v. Texas*, 970 F. Supp. 2d 593 (W.D. Tex. 2013); *Ala. Leg. Black Caucus v. Alabama*, 988 F. Supp. 2d 1285 (M.D. Ala. 2013); *New Hampshire v. Holder*, 293 F.R.D. 1 (D.D.C. 2013); *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840 (E.D. Wis. 2012); *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012); *Favors v. Cuomo*, No. 11-CV-5632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *James v. FEC*, 914 F. Supp. 2d 1 (D.D.C. 2012); *McCutcheon v. FEC*, 893 F. Supp. 2d 133 (D.D.C. 2012); *Mi Familia Vota Educ. Fund v. Detzner*, 891 F. Supp. 2d 1326 (M.D. Fla. 2012); *NAACP v. Snyder*, 879 F. Supp. 2d 662 (E.D. Mich. 2012); *Desena v. Maine*, 793 F. Supp. 2d 456 (D. Me. 2011); *Little v. Strange*, 796 F. Supp. 2d 1314 (M.D. Ala. 2011); *Petteway v. Henry*, No. 11-511, 2011 WL 6148674 (S.D. Tex. Dec. 9, 2011); *Schonberg v. FEC*, 792 F. Supp. 2d 14 (D.D.C. 2011); *Smith v. Hosemann*, 852 F. Supp. 2d 757 (S.D. Miss. 2011); *United States v. Sandoval County*, 797 F. Supp. 2d 1249 (D.N.M. 2011); *Clemons v. U.S. Dep't of Commerce*, 710 F. Supp. 2d 570 (N.D. Miss. 2010).

The shortcomings of single-judge determinations, and the need for protection at the procedural-motion stage, are apparent in the recent dispositions of cases in which a three-judge court has been requested in the Fourth Circuit. Since 2010 and post-*Duckworth*, a three-judge court has been requested in ten voting rights cases in the Fourth Circuit.[6] In four of those ten cases, the request for a three-judge court was denied.[7] In three of the four cases in which a three-judge court was denied, the case was subsequently dismissed under Rule 12(b)(6) by a single judge.[8] By permitting a single judge to dispose of voting rights cases where the parties are statutorily entitled to resolution by a three-judge court, the Fourth Circuit is failing to protect voting rights litigants and to provide them the benefits

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[6] *Page v. Va. State Bd. of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014); *Jefferson Cnty. Comm'n v. Tennant*, 876 F. Supp. 2d 682 (S.D. W. Va. 2012); *Somers v. S.C. State Election Comm'n*, 871 F. Supp. 2d 490 (D.S.C. 2012); *Backus v. South Carolina*, 857 F. Supp. 2d 553 (D.S.C. 2012); *Olson v. O'Malley*, Civil No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012); *Gorrell v. O'Malley*, Civil No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011); *Carter v. Va. State Bd. of Elections*, No. 3:11-CV-00030, 2011 WL 1637942 (W.D. Va. Apr. 29, 2011); *Butler v. City of Columbia*, No. 3:10-CV-794, 2010 WL 1372299 (D.S.C. Apr. 5, 2010).

[7] *Benisek*, 11 F. Supp. 3d 516; *Olson*, Civil No. WDQ-12-0240, 2012 WL 764421; *Gorrell*, Civil No. WDQ-11-2975, 2012 WL 226919; *Carter*, No. 3:11-CV-00030, 2011 WL 1637942.

[8] *Benisek*, 11 F. Supp. 3d 516; *Olson*, Civil No. WDQ-12-0240, 2012 WL 764421; *Gorrell*, Civil No. WDQ-11-2975, 2012 WL 226919.

Congress intended in enacting the Three-Judge Court Act.

II. The Safeguard Provided by Three-Judge Panels in Reapportionment Cases Is Especially Important Following the Elimination in 2013 of a Major Voting Rights Act Protection in *Shelby County v. Holder*.

In *Shelby County v. Holder*, this Court justified striking down the coverage formula for Section 5 pre-clearance under the Voting Rights Act in part by identifying two other laws on which voting rights litigants can rely for protection. *See* 133 S. Ct. at 2628 (Fifteenth Amendment), 2631 (Section 2 of the Voting Rights Act). Writing for the majority, Chief Justice Roberts noted that the Voting Rights Act alone is insufficient to fully protect against "electoral arrangements that affect the value of minority votes," concluding that even the Section 5 pre-clearance scheme "does not cure the problem" of minority vote dilution resulting from reapportionment and other "second-generation barriers" to voting. *Id.* at 2629. Nonetheless, the Court invalidated the coverage formula for pre-clearance, and voting rights litigants in reapportionment cases were left with even fewer avenues for obtaining relief.

In this post-*Shelby County* legal environment where litigants under the Voting Rights Act are entirely dependent on Section 2 for relief, a three-judge court's protection against bias and assurance of "more weight and greater deliberation" are more

important than ever. *Phillips*, 312 U.S. at 250. This is especially so given the number of states that have acted quickly since the Court's decision in *Shelby County* to pass laws that would restrict access to the ballot or redistrict in the middle of the decennial U.S. Census cycle.[9]

Such attempts by the states to roll back voting protections are illustrative of a point NAACP Executive Director Roy Wilkins made in a statement to the U.S. House subcommittee considering continuation of the Three-Judge Court Act in 1973:

> The three-judge Federal court statute has been a principal vehicle on which minorities have resisted oppressive State legislative and administrative actions. That the Supreme Court caseload has increased under that statute is not a reason to condemn it. Rather, this increase speaks eloquently of the extent of the failure of States to honor, and in some cases, to abridge the constitutional rights of minorities.

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[9] *See Voting Laws Roundup 2015*, Brennan Center for Justice, June 3, 2015, http://www.brennancenter.org/analysis/voting-laws-roundup-2015 (noting at least 113 restrictive bills have been introduced in 33 states in 2015); *Voting Laws Roundup 2014*, Brennan Center for Justice, Dec. 18, 2014, http://www.brennancenter.org/analysis/voting-laws-roundup-2014 (at least 83 restrictive bills in 29 states in 2014); *Voting Laws Roundup 2013*, Brennan Center for Justice, Dec. 19, 2013, http://www.brennancenter.org/analysis/election-2013-voting-laws-roundup (at least 92 restrictive bills in 32 states).

Three-Judge Court and Six-Person Civil Jury, Subcomm. on Courts, Civil Liberties, and Admin. of Justice of the Comm. on the Judiciary 146 (Oct. 10, 1973 & Jan. 24, 1974) (statement of Roy Wilkins). In the face of continuing efforts by state governments nationwide to dilute minority votes and roll back voting rights, particularly in the absence of pre-clearance under the Voting Rights Act, it is imperative that voting rights litigants be afforded their statutory right to have their cases weighed and resolved by a three-judge court.

Additionally, three-judge panels provide for expeditious resolution of reapportionment disputes under impending election deadlines, which is necessary to ensure orderly election administration and minimize voter confusion. *See* 17 Fed. Prac. & Proc. Juris. § 4040 (3d ed.) (citing Act of June 27, 1988, 100th Cong., 2d Sess., Pub. L. 100-352, 102 Stat. 662) (noting that Congress has intentionally preserved direct appeals from three-judge courts because "[t]here is little to be gained by delaying important litigation of the sort that initially commands an extraordinary district court of three judges—at least one of them a circuit judge—for review by three other judges on a court of appeals."). Moreover, redistricting plans exist at best for only one decade, until the next decennial Census. Delayed adjudication of plaintiffs' fundamental rights may allow elections to proceed for much of the decade using unconstitutional districts.

Expeditious review is even more critical given the inapplicability of Section 5. Prior to this Court's *Shelby County* decision, Section 5 operated to ensure

that voting changes could not be implemented until they had received federal pre-approval. *See* 52 U.S.C. § 10304(a). This allowed groups like the Virginia NAACP the time needed to review proposed changes and weigh in on their effect on protected voters. Now voting rights litigants bear the enormous burden of preventing a deleterious voting change from immediately going into effect. As a result, the expediency guaranteed by a three-judge panel is even more significant, and the Fourth Circuit should employ it as other circuits do—granting litigants the right to have important redistricting cases heard promptly by three judges, and then having a direct path for appeal to this Court.

CONCLUSION

For the reasons articulated above, *amicus curiae* respectfully requests that the Court grant Petitioners' request to vacate the decision below and remand for consideration by a three-judge district court.

Respectfully submitted,

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